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v.
United States

Docketed:
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Courts: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Rosenbaum, Mark D.

Counsel for respondent: Solicitor General

ntry	Date	Note	Proceedings and Orders
1	Dec 16 1983		Application for extension of time to file petition and order granting same until February 2, 1984 (Rehnquist, December 19, 1983).
2	Feb 2 1984	G	Petition for writ of certiorari filed.
4	Mar 7 1984		Order extending time to file response to petitior until April 6, 1984.
5	Apr 5 1984		Order further extending time to file response to petition until May 6, 1984.
6	May 7 1984		Memorandum of respondent United States filed.
7	May 8 1984		DISTRIBUTED. May 24, 1984
8	May 9 1984		Lodging received from the Solicitor General.
9	May 9 1984	X	Supplemental brief of respondent United States filed.
10	May 29 1984		The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.
12	Jul 2 1984		Order extending time to file brief of petitioner on the merits until July 20, 1984.
13	Jul 18 1984		Joint appendix filed.
14	Jul 20 1984		Brief amicus curiae of Central Conn. for Conscientious Objectors, et al. filed.
15	Jul 20 1984		Brief of petitioner David A. Wayte filed.
16	Jul 23 1984		Record filed.
17	Jul 23 1984		Certified original transcripts & C.A. pleadings received. (Volumes 1 thru 18).
18	Aug 17 1984		Brief amicus curiae of Legal Foundation of America filed.
19	Aug 20 1984		Application for leave to file brief on the merits in excess of the page limits filed with Justice Rehnquist
20	Aug 20 1984		and order denying same on August 21, 1984 (A-112).
21	Aug 23 1984		Brief of respondent United States filed.
22	Aug 28 1984		CIRCULATED.
23	Aug 28 1984		SET FOR ARGUMENT. Tuesday, November 6, 1984. (1st case)
24	Oct 25 1984	X	Reply brief of petitioner David A. Wayte filed.
25	Nov 6 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1292

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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

DAVID ALAN WAYTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented

1.) May the United States validly investigate and prosecute for refusal to register with the Selective Service only those individuals who are selected pursuant to an enforcement program designed to identify vocal opponents to draft registration?

2.) Does the 30-day notice and comment period established by 50 U.S.C. App. §463(b) apply to presidential proclamations as well as to regulations issued by the Director of Selective Service?

3.) Does the general grant of rulemaking power to the Director of Selective Service constitute "legislative authority" sufficient to render the Service's self-imposed notice-and-comment period judicially enforceable?

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IN THE

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October Term, 1983

DAVID ALAN WAYTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner David Alan Wayte respectfully prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on July 19, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 710 F.2d 1385, appears in the Appendix hereto at A-2. The opinion of the United States District Court for the Central District of California, reported at 549 F.Supp. 1376, appears in the Appendix at A-25.[1]

[1]Hereinafter citations to the opinion of the Court of Appeals will be given as 710 F.2d at ____, A-____; citations to the district court's opinion will be given as 549 F.Supp. at ____, A-____.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 19, 1983. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied on November 4, 1983. On December 20, 1983, Hon. William H. Rehnquist, Circuit Justice for the Ninth Circuit, granted petitioner's application for an extension of time to and including February 2, 1984 for the filing of this petition.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATUTES AND REGULATIONS INVOLVED

50 U.S.C. App. §453, which is set out in full in the Appendix at A-1, provides in pertinent part that males between the ages of 18 and 26 may be required to register for the draft "at such time or times and place or places and in such manner, as shall be determined by proclamation of the President and by rules and regulations . . . ."

50 U.S.C. App. §463(b), which is set out in full in the Appendix at A-2, provides that no regulation issued under the Military Selective Service Act will be effective until the expiration of a 30-day notice and comment period, except when such requirement is expressly waived by the President.

Presidential Proclamation 4771, 45 Fed.Reg. 45247 (July 2, 1980), which is set out in full in Appendix at A-3, specifies certain details of the legal obligation to register imposed by 50 U.S.C. App. §453 upon draft-age males, and delegates to the Director of Selective Service the responsibility to prepare other necessary rules and regulations.

STATEMENT OF THE CASE

Petitioner David Alan Wayte was indicted for failure to register with the Selective Service. The district court dismissed that indictment based on both its finding that Wayte was the target of impermissible selective prosecution and its legal conclusion that Presidential Proclamation 4771, implementing the Military Selective Service Act, was invalid. (549 F.Supp. at 1389-91; A-42-47.) The Ninth Circuit rejected both holdings and reversed the district court's judgment. (710 F.2d at 1389; A-14.)

A. The Duty to Register

The Military Selective Service Act, 50 U.S.C. App. §453, provides that males between the ages of 18 and 26 may be required to register for the draft. The statute delegates to the President the authority to define the precise legal obligations demanded of potential registrants.

On July 2, 1980, pursuant to this statutory authority, President Carter issued Proclamation 4771, directing male citizens born during 1960 to register during the week of July 21, 1980; young men born in 1961 to register the week of July 28, 1980; and those born in 1962 to register the week of January 5, 1981. (45 Fed.Reg. 45247.) Presidential Proclamation 4771 ordered draft registrants to present themselves during certain hours before designated employees at classified post offices or before appropriately appointed registrars. The Proclamation also confirmed prior presidential delegation of responsibility to the Director of Selective Service to prepare other rules and regulations that would complete the definition of the legal duty to register.

Proclamation 4771 required draft registration to begin less than three weeks after its promulgation. It made no provision for a notice and comment period.

Prior to issuance of Proclamation 4771, the Director of Selective Service had issued regulations "to provide revised procedures for the administration of registration in the event the President issues his Proclamation directing that registration be conducted." 45 Fed.Reg. 40577. Those regulations describe the specific acts that registrants must complete in order to register lawfully; for example, furnish certain information on an appropriate card and supply proof of identity to authorized personnel. 32 C.F.R. Part 1615. The regulations were first published for comment on June 16, 1980. 45 Fed.Reg. 40577. The regulations were issued in final form on July 18, 1980, after a 32-day notice and comment period. 45 Fed.Reg. 48130.

B. The Government's "Passive Enforcement" System

At the time of pretrial proceedings in this case, between 500,000 and 1,000,000 men had failed to register for the draft. In response to this overwhelming noncompliance, the Selective Service established a limited enforcement system, described by the government itself as a "passive enforcement" policy, through which it began to process information it received that specific men had not registered.

As described in both a July 14, 1981 memorandum from Assistant Attorney General D. Lowell Jensen, the head of the Justice Department's Criminal Division, to Attorney General William French Smith, and a July 6, 1981 memorandum from David J. Kline, Senior Legal Advisor, General Litigation Section, to his chief, Lawrence Lippe, the Selective Service referred to the Justice Department for investigation and possible prosecution *only* the

> "names of young men who fall into two categories: (1) those who wrote to Selective Service and said they refused to register and (2) those whose neighbors and others reported them as persons who refused to register." See 710 F.2d at 1386; A-8.

The Government's passive enforcement policy has, from its inception in January 1981 to date, resulted in the indictments and prosecutions of only 16 young men — all vocal dissenters against the draft.

Although the Justice Department did not itself initiate the passive enforcement system, it knowingly participated in the Service's program: at Wayte's pretrial evidentiary hearing Kline, who had been assigned Justice Department responsibility for overall enforcement of the draft registration law, testified that the Department did not consider it necessary or appropriate to modify Service activities or procedures. No names of suspected nonregistrants were referred for investigation and prosecution except by the Service's administration of its passive program.

The Government has consistently understood that application of the passive enforcement system necessarily means that all young men whose names have been referred by Selective Service for investigation and possible prosecution—and, therefore *all* men in fact prosecuted—will have voiced dissent against the draft and draft registration: the system cannot work in any other manner. A June 30, 1982 memorandum from Jensen to F. Henry Habicht II, Special Assistant to Attorney General Smith, specifically regarding indictments of nonregistrants, and marked "Background Information Not For Public Release," recognized that targeting nonregistrants reported by the passive program meant that "the first prosecutions are liable to consist of a large sample of persons who object on religious and moral grounds and persons who publicly refuse to register."

Jensen described the Government's enforcement program similarly in a memorandum to Attorney General Smith on July 9, 1982, acknowledging that defendants singled out by

the program are liable to raise "thorny selective prosecution claims." (549 F.Supp. at 1382; A-26.) Jensen also predicted that development of an "active" enforcement program utilizing Social Security records would allow the Government to "create an *appropriate* selection criterion, most probably one based on randomness." (549 F.Supp. at 1381; A-24; emphasis supplied.)

The most detailed governmental analysis of Selective Service's passive enforcement system is found in a March 2, 1982 draft letter from Jensen to Herbert C. Puscheck, Associate Director, Plans and Operations, Selective Service System, prepared by Kline. (549 F.Supp. at 1394; A-31.) The letter warned of serious First Amendment problems from operation of the system:

> "There is an even more important objection to the present scheme than that it wastes investigative resources. The present passive identification program is liable to result in adverse judicial decisions based on defendant claims of selective prosecution.
>
> "[. . . .]
>
> "Unfortunately, we believe that if the government initiates prosecutions with only the present passive identification scheme in place, there exists a real risk that the United States will lose at least a few of the initial cases. There is a high probability that persons who write to the Service and that persons who are reported by others are vocal proponents of non-registration. Since a passive identification scheme necessarily means that there will be enormous numbers of nonregistrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly lead to claims that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights. See *United States v. Falk*, 479 F.2d 816 (7th Cir. 1973) (en banc). Indeed, with the present universe of hundreds of thousands of non-registrants, the chance that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning."

Kline himself testified at Wayte's evidentiary hearing on discriminatory prosecution that he became concerned about selective prosecution claims at trials for nonregistration almost immediately after his assignment in July 1980 to supervise enforcement of the registration law.

C. The Indictment of Petitioner and the Proceedings Below

Petitioner Wayte was indicated on July 27, 1982 for his failure to register with the Selective Service. He had previously written two letters to the President expressing his oppposition to draft registration and stating his intention not to register.[1]

On September 27, 1982 the district court granted petitioner's motion for an evidentiary hearing on the defense of selective prosecution. On October 29, 1982 the court issued a decision setting forth the basis for its finding of a *prima facie* case of impermissible selective prosecution and also entered various discovery orders in connection with the evidentiary hearing. The government refused to comply with these discovery orders.

On November 15, 1982, following the evidentiary hearing, the district court granted Wayte's motion to dismiss the indictment on the ground that he was the target of impermissible selective prosecution. As a separate basis for dismissing the indictment, the district court held that the

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[1] Petitioner had also appeared at numerous public demonstrations across the country and on many radio and television programs to state his dissent. Reports and transcripts of some of these appearances were maintained in the prosecution file on Wayte.

time, place and manner requirements of Presidential Proclamation 4771 are invalid because the Proclamation was issued without the required notice and comment period.

The Ninth Circuit, by a 2-1 decision, reversed the district court's dismissal of Wayte's indictment. The majority (Circuit Judge Wright and District Judge Coughenour) upheld the district court's finding that others similarly situated to Wayte had not been prosecuted, but ruled that Wayte had not shown he was selected from the larger group because of his exercise of constitutional rights. (710 F.2d at 1387; A-11.) The Court held that the undisputed proof concerning the existence and use of the "passive enforcement system" did not establish a *prima facie* case of selective prosecution:

> "The government may, in making prosecutional decisions, 'consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in illegal activity.' " (710 F.2d at 1388, A-11.)

The majority also held that Presidential Proclamation 4771 and the implementing Selective Service regulations are valid. (710 F.2d at 1388-89; A-13-14.) Circuit Judge Schroeder dissented. (710 F.2d at 1389-90; A-15-17.)

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Decision Upholding the Constitutionality of the Government's "Passive Enforcement" System for Prosecution of Vocal Draft Nonregistrants Directly Conflicts With a Recent Decision of the Sixth Circuit

This case raises a constitutional question of extraordinary importance: may our government enforce draft registration—or, by extension, any law—by deliberately selecting for investigation and prosecution only a class of vocal protestors against that law?

At the present time the answer to this question depends entirely upon the fortuity of the nonregistrant's residence. If he lives in Los Angeles or elsewhere within the Ninth Circuit, the answer is "yes": In the opinion below a panel of the Ninth Circuit held by a 2-1 vote that the government's "passive enforcement" system for prosecution of draft nonregistrants is valid. If he lives and is indicted somewhere in the Sixth Circuit, however, the answer is "no": In a unanimous decision filed on November 25, 1983, a panel of the Sixth Circuit reached precisely the opposite result, concluding that the passive enforcement policy "clearly violates the first amendment." *United States v. Schmucker*, No. 83-3701 (6th Cir. Nov. 25, 1983).[3] (A copy of the Sixth Circuit's decision appears in the Appendix at A-48.)

It is well-established that selectivity in prosecution, standing alone, creates no constitutional problem. *Oyler v. Boles*, 368 U.S. 448, 456 (1962). This Court has suggested, how-

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[3]Other cases questioning the constitutionality of the Selective Service's "passive enforcement" policy are still pending in the Sixth and Ninth Circuits. In addition, passive enforcement cases have been presented to district courts within the Second, Fourth, Seventh, Eighth and Tenth Circuits.

ever, that the deliberate selection of a class of defendants for prosecution because of their race or religion or other arbitrary classification violates equal protection. *Id.* at 456; *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Nonetheless, the Court has never specifically addressed the standard for establishing selective prosecution nor considered whether selection based upon the exercise of constitutional rights is impermissible.

The Ninth Circuit's opinion in this case recognizes a two-prong test for establishing impermissible selective prosecution. First, the defendant must show that others similarly situated have not been prosecuted for the offense. Second, the defendant must establish that his "selection was based on an unjustifiable standard." (710 F.2d at 1387; A-10.) *See also* Brief of the United States not opposing grant of certiorari in *Hobby v. United States*, No. 82-2140, at p. 10:"[W]hen the decision to prosecute is based upon an impermissible criterion such as race or religion or the exercise of constitutional rights, the general rule [of prosecutorial discretion] must yield to an exception."

The Ninth Circuit, like the Sixth Circuit in *Schmucker*, had no difficulty in concluding that the first element of this test was satisfied. The evidence established that, while more than 500,000 eligible men had failed to register for the draft, only 12 (at the time of *Wayte*) or 13 (at the time of *Schmucker*) vocal nonregistrants had actually been selected for prosecution.

The Ninth Circuit and the Sixth Circuit, however, reached directly conflicting results as to the second prong of the test. The Ninth Circuit concluded that it was permissible for the government to prosecute only those who publicly express their conscientious refusal to obey the registration law while leaving aside all who engage in covert refusals to register. The majority accepted the government's explanations that

the passive enforcement system was necessary, notwithstanding its recognized limitation to vocal objectors, because "(1) the identities of other violators were not known and (2) the violators who [publicly] expressed their refusal to register made clear their willful violation of the law." (710 F.2d at 1388; A-11.)

Circuit Judge Schroeder, in dissent, rejected this analysis, finding that this was not a case in which

> "the offender's statements were necessary or even useful to establish willfullness . . . because the undisputed facts show that before initiating prosecution, the government wrote to each suspected violator offering him a chance to comply with the law. Only those who ignored this warning were prosecuted." (710 F.2d at 1390; A-16.)

Moreover, Judge Schroeder noted that alternative enforcement methods that would have identified "quiet" nonregistrants were easily available to the government. (*Ibid.*)

The Sixth Circuit similarly rejected the government's explanations for its discriminatory enforcement policy, concluding that "a prosecutorial policy violates the First Amendment if it is directed solely at 'the vocal nonregistrant' ":

> "[A] law is not content neutral that limits draft prosecution to nonregistrants who 'vocalize' their religious, moral or political objections to the government. The government lacks the power to adopt a stated policy of prosecuting people who publicly confess their failure to register in confessions which criticize government policy." (Slip op'n at 6.)[6]

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[6]Like the Sixth Circuit in *Schmucker*, the Seventh Circuit has also held where a vocal dissenter appears to have been singled out for prosecution based on his exercise of First Amendment rights, the government's policy is inherently suspect and will be overturned absent "compelling evidence" of a nondiscriminatory purpose. *United States v. Falk*, 479 F.2d 616, 621-24 (7th Cir. 1973) (en banc). Indeed, the *Falk* decision was cited not only by Judge Schroeder in her dissent and by the Sixth Circuit in *Schmucker*, but also in the Kline draft letter of March 1, 1982, warning of serious First Amendment problems raised by the government's passive enforcement system.

This direct conflict between the Sixth and Ninth Circuits on an issue concerning the exercise of First Amendment rights particularly in view of pending prosecutions in other circuits raising the identical question, justifies the grant of certiorari to review the judgment below.

2. The Ninth Circuit's Decision Enforcing Presidential Proclamation 4771 Raises Significant and Recurring Issues Concerning the Proper Interpretation of Section 13(b) of the Military Selective Service Act

As an alternative ground for dismissing petitioner Wayte's indictment, the district court held that Presidential Proclamation 4771, 45 Fed.Reg. 45, 247 (1980), was void for non-compliance with the 30-day notice and comment requirement of section 13(b) of the Military Selective Service Act, 50 U.S.C. App. §463(b). (549 F.Supp. at 1389-91; A-46-47.)

The Ninth Circuit reversed the district court's decision, holding that the term "regulation" in §463(b) is not properly interpreted to include appropriate presidential "proclamations." The majority opinion declared that the "confusing legislative history of the section does not warrant a departure from the plain meaning of the statutory language." (710 F.2d at 1389; A-12.) (Judge Schroeder did not address this issue in her dissent.)[5]

The Ninth Circuit's opinion imposes significant limitations on the reach of the notice-and-comment provisions of the Military Selective Service Act. The correctness of this important decision is open to serious question.

As the district court found, the plain meaning of 50 U.S.C. App. §463(b) will not support such a narrow interpretation, limited only to "administrative" regulations. (549 F.Supp.

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[5]The Sixth Circuit reserved decision of this issue in *Schmucker*.

at 1390, A-2, citing *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928) "in which the court characterized a presidential proclamation as a lawful exercise of the President's discretion to make 'public regulations' interpreting a statute."[6]

The district court also relied upon two lower court decisions, which like *Hampton* were unnoted by the Court of Appeals and are incompatible with its ruling. These cases specifically repudiate a narrow construction of the term "regulations" in §463(b), instead interpreting its meaning functionally. *Piercy v. Tarr*, 343 F.Supp. 1120, 1128 (N.D. Cal. 1972) ("directives from the Director of Selective Service were 'regulations' subject to notice and comment requirements because even though 'directives,' they purported to alter significantly the rules and regulations");[7] *Gardiner v. Tarr*, 341 F.Supp. 422, 434 (D.D.C. 1972) (same).

The Ninth Circuit's assertion that the legislative history for §463(b) was "confusing" is unsupported and unsupportable. Section 463(b) was added by 1971 amendments to the Act: at that time it was clear to Congress that most "regulations" implementing the Act were promulgated by the President in the form of executive orders. See 117 Cong. Rec. 20487 (June 17, 1971) ("Presently the Selective Ser-

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[6]The common dictionary definition of "regulation" is

> "a rule or order having the force of law issued by an executive authority of a government usually under power granted by a constitution or delegated by legislation: as . . . one issued by the president of the U.S. or by an authorized subordinate. . . ." *Webster's Third New International Dictionary* 1913 (1976).

[7]The court in *Piercy* stated:

> "The defendants may not avoid the requirements by means of labels. [I]t matters little whether [the] directive is a 'rule,' an 'order,' or a set of 'instructions' or a sui generis 'directive.' . . . The court cannot hold that the publication requirements of the Act hinge on the particular format the Selective Service chooses to issue authoritative instructions couched in mandatory terms." 343 F.Supp. at 1128.

vice issues the bulk of its regulations in the form of executive orders. The remainder are issued by the Director.") (remarks of Senator McIntyre, co-sponsor of §463(b)). Senator McIntyre also remarked that the Selective Service system "is one of the few agencies which is not subject" to the notice and comment requirement of the Administrative Procedure Act, 5 U.S.C. §553. 117 Cong. Rec. 20488 (June 17, 1981):

> "Congress has barred any formal procedure under which *the President or the Director* would solicit public comment on proposed regulations before they are issued in final form.
>
> ". . . .
>
> "I believe that this amendment would cut down considerably on litigation because many of the questions . . . raised in the courts . . . could then be . . . cleared up with the Selective Service System prior to finalization of regulations. Moreover, this kind of public airing would result in greater acceptance by the people who are affected by these regulations." *Ibid.*

The substance of Presidential Proclamation 4771 is in no sense inherently 'executive': it could have equally derived from regulations published by the Director of Selective Service. Analytically, then, the limited construction of §463(b) created by the Ninth Circuit defeats the express legislative intent of the section. The judgment below, therefore, should be reviewed for this reason, as well.

3. The Ninth Circuit's Decision Enforcing the Selective Service Registration Regulations Conflicts With This Court's Decisions Requiring an Administrative Agency to Follow Its Own, Validly Adopted Procedures

In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), this Court held that for administrative regulations to "have the 'force and effect of law,' it is necessary to establish a nexus

between the regulations and some delegation of the requisite legislative authority by Congress." *Id.* at 304. When an agency has no such properly delegated power, its regulations are "interpretative" only and are not binding on the agency. *Id.* at 301-08. See generally 2 Davis, *Administrative Law Treatise* §§ 7.08-7.11 (2d ed. 1979).

The Ninth Circuit's opinion in this case raises an important question, apparently left unanswered in *Chrysler Corp. v. Brown*, *supra*, concerning the responsibility of administrative agencies, such as the Selective Service, to adhere to procedural requirements that they have imposed upon themselves pursuant to a general congressional grant of authority to adopt "necessary rules and regulations."

Prior to October 31, 1978 all rules and regulations issued by the Director of the Selective Service were subject to a 30-day notice and comment period. See 50 U.S.C. App. §463(b); Executive Order 11623, 36 Fed. Reg. 19963. On October 31, 1978 — well prior to issuance of the regulations at issue in the case at bar — the Acting Director of the Selective Service, Robert F. Schuck, published a report that specifically extended that period by providing that "at least 60 days will be allowed for comment on proposed regulations in the future." 43 Fed. Reg. 50980, 50981.

Notwithstanding this clear requirement for a 60-day comment period, the draft registration regulations, 32 C.F.R. part 1615, became effective only *32 days* following their initial promulgation. *Compare* 45 Fed. Reg. 40577 *with* 45 Fed. Reg. 48130. The Ninth Circuit excused the Selective Service's noncompliance with its own procedural rules by concluding that the Service's comment-period requirement was based on Executive Order 12044, not on independent statutory authority and that, for the reasons stated by the district court, Executive Order 12044 was judicially unenforceable:

> "The language of the Selective Service report indicates that it was conforming to the Executive Order. There is no reason to believe that it was based on statutory authority." (710 F.2d at 1389; A-13-14.)

The Ninth Circuit's opinion confuses "conformity" with "authorization," and in so doing has reached a result in direct conflict with decisions of this Court holding that where significant rights of an individual are affected, it is incumbent upon an agency to follow its own procedures — even where those procedures provide greater safeguards than may otherwise be required. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (compliance with publication policy for rules concerning welfare benefits); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (compliance with procedural safeguards for dismissal of employee); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (same).

Executive Order 12044 specifically *exempted* from its coverage "regulations issued with respect to a military or foreign affairs function of the United States." See §6(b)(2), Executive Order 12044, 1978 U.S. Code Cong. & Adm. News, p. 9681. The October 31, 1978 Schuck Report, which established the notice and comment period, did refer to Executive Order 12044, but then noted the applicability of the exemption for regulations concerning any military function:

> "The Director only issues regulations necessary to implement the Military Selective Service Act (50 U.S.C. App. §451 *et seq.*) 10 U.S.C. §672(a) and Executive Order 11804." 43 Fed. Reg. 50981.

The Ninth Circuit's opinion thus raises two important questions concerning the extent of the authority conferred by the Military Selective Service Act, 50 U.S.C. App. §§460(b)(1) and (c): (1) whether a "reviewing court" can "reasonably be able to conclude that the grant of authority

[contained in 50 U.S.C. App. §§460(b)(1) and (c), as cited above by Director Schuck] contemplates the regulations issued"; and (2) if this legislative authority is found, whether the regulations possess the "binding effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). Stated more broadly, as formulated by Professor Davis, the important question of administrative law raised is

> "When a statute provides in broad terms that an agency has authority to issue regulations, and neither the statute nor the legislative history provides a clear answer to the question whether only interpretative regulations are intended, which way should the statute be interpreted?" Davis, *Administrative Law Treatise* §7.8, p. 175 (1982 Supplement).

Here, 50 U.S.C. App. §460(b)(1) authorizes the President "to prescribe . . . necessary rules and regulations to carry out the provisions of this title . . .," and 50 U.S.C. App. §460(c) then authorizes him to delegate that authority: "The President is authorized to delegate any authority vested in him under this title, and to provide for subdelegation of any such authority." Pursuant to §460(c), on October 12, 1971 President Nixon issued Executive Order No. 11623, 36 Fed. Reg. 11963, delegating to the Director of Selective Service the authority to issue all appropriate rules and regulations.

The extent and nature of authority conferred by 50 U.S.C. App. §§460(b)(1) and (c) have never been reviewed by this Court, nor have the significant principles of administrative law implicated by the Ninth Circuit's opinion been tested in the context of a criminal prosecution. This Court, however, has previously analyzed similar statutory provisions, and has in those instances reached decisions at odds with the Circuit's decision here.

In *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 277, 279 (1969), for example, the Court

held that the United States Housing Act of 1937, §8, 50 Stat. 891, as amended, 42 U.S.C. §1408, providing that federal authorities are given general statutory power to make "such rules and regulations as may be necessary to carry out" federal programs for assistance to low-rent housing projects, furnished implicit authority for a circular issued by the Department of Housing and Urban Development, which required tenants of housing projects to be advised of the reasons for eviction, and afforded opportunity to respond.

The Court similarly stated in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980), that by the Occupational Health and Safety Act, 29 U.S.C. §657(g)(2), authorizing the Secretary of Labor to "prescribe such . . . regulations as . . . necessary to carry out [his] responsibilities under this chapter," the Secretary had properly "exercised his rulemaking power" in implementing a regulation which protected an employee's refusal to perform an assigned task because of reasonable fear of death or serious injury as a right afforded by the Act.

In *Powan Companies, Inc. v. United States*, 452 U.S. 247, 253 (1981), on the other hand, the Court held that a Treasury Regulation defining "wages" for the purpose of paying taxes under the Federal Insurance Contribution Act, and construed by the Commissioner of Internal Revenue, acting "only under his general authority to 'prescribe all needful rules' [citing 26 U.S.C. §7805(a)]," was interpretative, not legislative, as not "issued under a specific grant of authority."

The rulings in these decisions, and related others,[9] emphasize that the issue here is a substantial, recurring question

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[9]See, *e.g.*, *Chrysler Corp. v. Brown*, *supra*, 441 U.S. at 309-11 (grant of legislative authority for disclosure of documents regarding "[a]ffirmative action programs may not be derived from 5 U.S.C. §301, "housekeeping statute," providing that "[t]he head of an Executive

(footnote continued on following page)

for which resolution by clearly-stated precepts is necessary. The decision by the Ninth Circuit offered no analysis (or even citation of authority) for its restrictive determination.

CONCLUSION

For each of the foregoing reasons, Petitioner David Alan Wayte prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter.

DATED: February 2, 1984

Respectfully submitted

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Department . . . may prescribe regulations for the government of his department. . . ."); *Butterton v. Francis*, 432 U.S. 416, 424-26 (1977) (regulation promulgated by Secretary of Health, Education and Welfare valid as within "expressly delegated" rulemaking authority from §407(a) of the Social Security Act to prescribe standards for determining "unemployment"); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (EEOC pregnancy disability regulations without force of law since "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title"); *American Trucking Associations v. United States*, 344 U.S. 298, 312 (1958) ("promulgation of these rules for . . . carriers falls within the [Interstate Commerce] Commission's power, despite the absence of specific reference to leasing practices in the Act."); *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943) ("Our duty is at an end when we find the action of the Commission [issuance of comprehensive regulations governing chain broadcasting] was . . . made pursuant to authority granted by Congress.") *See also National Association of Pharmaceutical Manufacturers v. F.D.A.*, 637 F.2d 877 (2d Cir. 1981) (Friendly, J.).

APPENDIX.

50 U.S.C. App. § 453. Registration

Except as otherwise provided in this title [sections 451 to 471a of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

50 U.S.C. App. § 463. Nonapplicability of certain laws

(b) All functions performed under this title [sections 451 to 471a of this Appendix] shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) [sections 551 et seq. and 701 et seq. of Title 5] except as to the requirements of section 3 of such Act [section 552 of Title 5]. Notwithstanding the foregoing sentence, no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of this subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued.

Presidential Proclamation No. 4771

July 2, 1980, 45 Fed.Reg. 45247

REGISTRATION UNDER THE SELECTIVE SERVICE ACT

Section 3 of the Military Selective Service Act, as amended (50 U.S.C.App. 453) [this section], provides that male citizens of the United States and other male persons residing in the United States who are between the ages of 18 and 26, except those exempted by Sections 3 and 6(a) of the Military Selective Service Act [this section and section 456(a) of this Appendix], must present themselves for registration at such time or times and place or places, and in such manner as determined by the President. Section 6(k) [section 456k of this Appendix] provides that such exceptions shall not continue after the cause for the exemption ceases to exist.

The Congress of the United States has made available the funds (H.J.Res. 521, approved by me on June 27, 1980 [Pub.L. 96-282, June 27, 1980, 93 Stat. 552]), which are needed to initiate this regulation, beginning with those born on or after January 1, 1960.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, by the authority vested in me by the Military Selective Service Act, as amended (50 U.S.C.App. 451 et seq.) [section 451 et seq. of this Appendix], do hereby proclaim as follows:

1-1. Persons to be Registered and Days of Registration.

1-101. Male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided.

1-102. Persons born in calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980.

1-103. Persons born in calendar year 1961 shall present themselves for registration on any of the six days beginning Monday, July 28, 1980.

1-104. Persons born in calendar year 1962 shall present themselves for registration on any of the six days beginning Monday, January 5, 1981.

1-105. Persons born on or after January 1, 1963, shall present themselves for registration on the day they attain the 18th anniversary of their birth or on any day within the period of 60 days beginning 30 days before such date; however, in no event shall such persons present themselves for registration prior to January 5, 1981.

1-106. Aliens who would be required to present themselves for registration pursuant to Sections 1-101 to 1-105, but who are in processing centers on the dates fixed for registration, shall present themselves for registration within 30 days after their release from such centers.

1-107. Aliens and noncitizen nationals of the United States who reside in the United States, but who are absent from the United States on the days fixed for their registration, shall present themselves for registration within 30 days after their return to the United States.

1-108. Aliens and noncitizen nationals of the United States who, on or after July 1, 1980, come into and reside in the United States shall present themselves for registration in accordance with Sections 1-101 to 1-105 or within 30 days after coming into the United States, whichever is later.

1-109. Persons who would have been required to present themselves for registration pursuant to Sections 1-101 to 1-108 but for an exemption pursuant to Section 3 or 6(a)

of the Military Selective Service Act, as amended [this section or Section 456(a) of this Appendix], or but for some condition beyond their control such as hospitalization or incarceration, shall present themselves for registration within 30 days after the cause for their exempt status ceases to exist or within 30 days after the termination of the condition which was beyond their control.

1-2. Places and Times for Registration.

1-201. Persons who are required to be registered and who are in the United States on any day fixed herein for their registration, shall present themselves for registration before a duly designated employee in any classified United States Post Office.

1-202. Citizens of the United States who are required to be registered and who are not in the United States on any of the days set aside for their registration, shall present themselves at a United States Embassy or Consulate for registration before a diplomatic or consular officer of the United States or before a registrar duly appointed by a diplomatic or consular officer of the United States.

1-203. The hours for registration in United States Post Offices shall be the business hours during the days of operation of the particular United States Post Office. The hours for registration in United States Embassies and Consulates shall be those prescribed by the United States Embassies and Consulates.

1-3. Manner of Registration.

1-301. Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service.

1-302. When reporting for registration each person shall present for inspection reasonable evidence of his identity.

After registration, each person shall keep the Selective Service System informed of his current address.

Having proclaimed these requirements for registration, I urge everyone, including employers in the private and public sectors, to cooperate with and assist those persons who are required to be registered in order to ensure a timely and complete registration. Also, I direct the heads of Executive agencies, when requested by the Director of Selective Service and to the extent permitted by law, to cooperate and assist in carrying out the purposes of this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of July, in the year of our Lord nineteen hundred and eighty, and the Independence of the United States of America the two hundred and fourth.

JIMMY CARTER

UNITED STATES of America,
Plaintiff-Appellant,

v.

David Alan WAYTE, Defendant-Appellee.
No. 82-1699.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 2, 1983.
Decided July 19, 1983.

Before: WRIGHT and SCHROEDER, Circuit Judges, and COUGHENOUR, District Judge.*

WRIGHT, Circuit Judge:

Wayte was indicted for failure to register for the draft under section three of the Military Selective Service Act, 50 U.S.C.App. § 453. The district court dismissed the indictment based on its finding of selective prosecution and its conclusion that the implementing Presidential Proclamation was issued invalidly. *United States v. Wayte*, 549 F. Supp. 1376 (C.D. Cal. 1982).

BACKGROUND

On July 2, 1980, pursuant to statutory authority, President Carter issued Presidential Proclamation 4771, directing male citizens born during 1960 to register with the Selective Service System during the week of July 21, 1980. 45 Fed. Reg. 45,247 (1980). Appellee fell within that class, but did not register. On August 4th he wrote to Selective Service, declaring that he had not registered and did not plan to do so. He sent a similar letter to the President.

Six months later he wrote another letter to Selective Service, stating that he still had not registered. He noted that

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*Of the Western District of Washington.

he would be "traveling the nation . . . . encouraging resistance and spreading the word about peace and disarmament."

Selective Service established a passive enforcement system through which it began to process information it received that specific men had not registered. Two categories were involved: those who wrote to Selective Service stating that they refused to register and those who were reported by others as refusing to register.

Selective Service screened out those who actually had registered, who were not required to register, or for whom it had insufficient information to investigate further. It sent letters to the rest, including Wayte, explaining the registration requirement, requesting compliance, and warning of possible prosecution for noncompliance. Wayte did not respond.

In July 1981 Selective Service transmitted the files of 134 nonregistrants to the Department of Justice for possible prosecution. Those still eligible but noncomplying were referred to the FBI for investigation and to the United States Attorney of the district of their residence. The United States Attorneys notified the men referred that unless they registered within a specified time, prosecution was possible. Such a letter was sent to Wayte on October 15. He did not respond.

In December 1981 a moratorium on efforts to prosecute was imposed. Nonregistrants were afforded a grace period, until February 28, 1982, within which to register.

On July 22, 1982 Wayte was indicted for willfully failing and refusing to register, in violation of 50 U.S.C.App. § 462.

After a hearing, the district court held that Wayte had made a showing of selective prosecution, which warranted

an evidentiary hearing on the issue. Wayte sought discovery of government documents relating to the prosecution of nonregistrants, including documents of the Department of Justice, Selective Service, Presidential Military Manpower Task Force, White House staff, and Department of Defense.

He sought to subpoena several government officials, including Presidential Counsellor Edwin Meese III, Selective Service Director Thomas Turnage, Secretary of Defense Caspar Weinberger, and Assistant Attorney General D. Lowell Jensen.

The court ordered production of some documents and ordered that Meese be made available to testify. The government refused to comply fully.

The court dismissed the indictment. *Wayte*, 549 F. Supp. 1376. It held that the government had not rebutted Wayte's prima facie case of selective prosecution. *Id.* at 1380-85. It held also that the implementing Presidential Proclamation was not promulgated properly. *Id.* at 1389-91.

1. *Selective Prosecution*

To establish selective prosecution, a defendant must show that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive. *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981).

The first element of that test has been established. The district court found that over 500,000 eligible men have failed to register for the draft. When this indictment was dismissed, only 12 others had been indicted for failure to register. All were vocal nonregistrants. The government does not dispute these facts. Many similarly situated men have not been prosecuted. *See United States v. Taylor*, 663 F.2d 919, 923 & n.6 (9th Cir. 1982).

However, Wayte has not shown that he was selected from the larger group because of his exercise of his constitutional rights. *See id.* at 923. Selectivity in prosecution is not impermissible. *Oyler v. Boles*, 368 U.S. 448, 456 (1962). He must show that the selection was deliberately based on an unjustifiable standard. *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972).

The government may not purposefully discriminate against persons who exercise their First Amendment rights. *Id.* Wayte contends that the government was aware that its passive enforcement system would result in the prosecution of vocal nonregistrants only. He argues that because the system was tainted, the government's ignorance of his First Amendment activity is irrelevant.

The evidence presented by Wayte does not demonstrate impermissible motivation. It demonstrates that the government was aware that the passive enforcement system would result in prosecutions of primarily two types of men: religious or moral objectors and vocal objectors. The government recognized that the latter probably would make claims of selective prosecution.

Wayte made no showing that the government focused its investigation on him because of his protest activities. *See Ness*, 652 F.2d at 892. He did not show that discriminatory policies underlay the selection of cases for prosecution. *See id.*

The circumstances here contrast sharply with those in *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), in which selective prosecution for noncooperation with the census was established. There census procedures would in the normal course identify noncooperators and furnish evidence of criminal intent. *Id.* at 1152. The government investigated only those who publicly attacked the census. *Id.*

It offered no explanation for its selection except prosecutorial discretion. *Id.*

Unlike census procedures, Selective Service registration procedures do not automatically reveal the identities of nonregistrants. The government investigated all whose names were brought to its attention.

The government offers two explanations for its selection procedure: (1) the identities of other violators were not known, and (2) violators who expressed their refusal to register made clear their willful violation of the law.

The first explanation is logical and does not evidence impermissible motives. Moreover the government has made an effort to establish a system for identifying nonregistrants who are not otherwise brought to its attention.

The second justification is permissible also. The government may, in making prosecutorial decisions, "consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in the illegal activity." *Taylor*, 693 F.2d at 923 (footnote omitted).

Because Wayte presented no evidence that this prosecution was motivated by his First Amendment activities, the district court's finding of selective prosecution was clearly erroneous.

Because Wayte made no initial showing of selective prosecution, he was not entitled to discovery of government documents. *See Ness*, 652 F.2d at 892. That access to the documents might have been helpful to him does not in itself entitle him to discovery. *Id.* The government's refusal to comply with the discovery orders was justified.

II. *Presidential Proclamation 4771*

As an independent ground for dismissing the indictment, the district court held that Presidential Proclamation 4771, 45 Fed. Reg. 45,247 (1980), was void for noncompliance

with the notice and comment requirement of 50 U.S.C.App. § 463(b). *Wayte*, 549 F. Supp. at 1389-91. Absent the Proclamation, there is no basis for criminal prosecution for non-registration. *See United States v. Mersky*, 361 U.S. 431, 437-38 (1960).

Section 463(b) provides in part:

> [N]o regulation issued under [the Selective Service] Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation.

50 U.S.C.App. § 463(b). It does not mention presidential proclamations.

Wayte argues that Congress intended the term "regulation" in that section to refer to presidential proclamations as well as Selective Service regulations. The force of that argument is diluted by Congress' conjunctive use of the terms "regulation" and "proclamation" elsewhere in the Selective Service Act.

Section 453 of the Selective Service Act provides that men shall register at that time and place and in that manner "determined by *proclamation* of the President *and* by *rules and regulations* prescribed hereunder." 50 U.S.C.App. § 453(a) (emphasis added). In light of Congress' reference to proclamations and regulations in that section, its § 463(b) reference to regulations alone indicates that proclamations do not fall within the notice and comment requirement.

The confusing legislative history of the section does not warrant a departure from the plain meaning of the statutory language. *See SEC v. Mount Vernon Memorial Park*, 664

F.2d 1358, 1364 (9th Cir.), *cert. denied*, 456 U.S. 961 (1982). Section 463(b) does not apply to presidential proclamations.

III. *Selective Service Regulations*

Wayte argues that dismissal was proper because the Selective Service registration regulations were issued in violation of a Selective Service requirement that a 60-day notice and comment period be provided. The regulations, 32 C.F.R. Part 1615 (1980), were issued in final form after a 32-day notice and comment period. *See* 45 Fed. Reg. 40,577 (1980).

The requirement of a 60-day notice and comment period was imposed by the Director of Selective Service in a report published November 2, 1978. 43 Fed. Reg. 50,980, 50,981 (1978). The report provided that "'in accord with Executive Order 12044, at least 60 days will be allowed for comment on proposed regulations in the future.'" *Id.* Executive Order 12044 prescribed a 60-day notice and comment period for federal agency regulations, but exempted military regulations. 43 Fed. Reg. 12,661 (1978).

The district court rejected Wayte's challenge to the Selective Service regulations, holding that Executive Order 12044 was not based on statutory authority and was judicially unenforceable. *Wayte*, 549 F. Supp. at 1386-89. Wayte does not argue that Executive Order 12044 is enforceable, but contends that the Selective Service 60-day requirement was adopted independently. We disagree.

The district court impliedly found that the Selective Service requirement was based on Executive Order 12044, not on independent statutory authority. The requirement was proposed on April 11, 1978, 43 Fed. Reg. 15,211, less than three weeks after the Executive Order was issued on March 23. *Id.* at 12,661. The language of the Selective Service report indicates that it was conforming to the Executive

Order. There is no reason to believe that it was based on statutory authority.

We conclude that the 60-day Selective Service requirement was an effort to conform to Executive Order 12044. It is judicially unenforceable for the reasons stated in the district court's opinion. *Wayte*, 549 F. Supp. at 1386-89.

The judgment is REVERSED.

DISSENT IN UNITED STATES v. DAVID ALAN WAYTE, No. 82-1699 SCHROEDER, Circuit Judge.

Filed: July 19, 1983.

I respectfully dissent from the majority's holding that Wayte failed to establish that he was selected for prosecution because of his exercise of first amendment rights.

The initiation of Wayte's prosecution was a part of the government's deliberate policy to prosecute only men who wrote to the government to report their failure to register for the draft, or men whom third parties reported as having disobeyed the registration requirement. This enforcement policy was directed toward persons whom the government viewed as "vocal" non-registrants as opposed to "quiet" non-registrants. 549 F. Supp. at 1379, 1384. The policy thus was designed to punish only those who had communicated their violation of the law to others.

The policy was successful because, as the record here shows, only vocal non-registrants had been indicted at the time this prosecution began. Thousands of others who also violated the law were not prosecuted. There thus is no question, as the majority recognizes, that Wayte made the required showing that similarly situated violators were not prosecuted. Nor, in my view, is there any doubt that Wayte established that the prosecution was impermissibly based upon his exercise of first amendment rights.

This court has already held that an enforcement procedure focusing solely upon vocal offenders is inherently suspect. *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972). The Seventh Circuit has similarly held that where a vocal dissenter appears to have been singled out for prosecution, the government must accept the burden of proving nondiscriminatory enforcement. *United States v. Falk*, 479 F.2d 616, 621 (7th Cir. 1973) (en banc). The key question

before the district court in this case, therefore, was whether the government sufficiently explained the policy by showing it was motivated by other concerns. The district court found that the government failed to make such a showing, after carefully reviewing and evaluating all of the evidence which was submitted by both sides. Its findings must be upheld unless clearly erroneous, and the majority fails to demonstrate that they were.

The majority accepts the government's argument that its selective policy was justified by its need to establish wilfulness and by its inability to find other violators. Neither theory is plausible.

This is not a case where the offender's statements were necessary or even useful to establish wilfulness. It therefore is not controlled by *United States v. Taylor*, 693 F.2d 919 (9th Cir. 1982). There, we affirmed the district court's finding that defendants had failed to establish selective prosecution for participation in an illegal strike. We pointed out that the failure to report to work alone was "'an equivocal act'" which could have had an innocent explanation. 693 F.2d at 923 n.5. Failure to register for the draft might similarly be explained by ignorance of the requirement. But this case is unlike *Taylor* because the undisputed facts show that before initiating prosecution, the government wrote to each suspected violator offering him chance to comply with the law. Only those who ignored this warning were prosecuted. Thus *Taylor* hardly compels reversing the district court's findings in this case, for here the government had a method, independent of suspected violators' communications, for excluding from prosecution persons who might have an innocent explanation for failure to register.

This also is not a case in which the government showed that financial or other constraints dictated limiting its enforcement policy to vocal violators. *See United States v. Wilson*, 639 F.2d 500, 505 (9th Cir. 1981). Even assuming that budgetary considerations could justify a policy restricting prosecution to those who exercise first amendment rights, no such justification was shown. Rather, as the district court pointed out, quiet non-registrants could easily have been traced. The district court noted that a law student armed only with a telephone was able to obtain lists, from several randomly chosen states, of persons legally required to register; those lists could have been compared with the government's list of actual registrants to locate violators. 549 F. Supp. at 1381 & n.6. The availability of alternative enforcement methods is borne out by the fact that the government has now implemented a system for identifying quiet non-registrants. But the present existence of such a system cannot excuse its absence at the time this defendant's prosecution was instituted. *Cf. United States v. Steur*, 601 F.2d 325, 328 (7th Cir.), *cert. denied*, 449 U.S. 979 (1979) (prosecution of vocal violator permissible so long as other violators prosecuted as well).

The effect of the majority's opinion is to permit the government to prosecute a citizen because he has spoken out rather than because he has violated the law. The result weakens our indispensible but fragile freedom to express unpopular ideas.

I would affirm the district court.

UNITED STATES *of America*, Plaintiff,

v.

David Alan WAYTE, Defendant.

No. CR 82-630 TJH.

United States District Court,

C.D. California.

Nov. 15, 1982.

Background

Defendant David Alan Wayte was indicted on July 22, 1982 for failure to register for the draft under section three of the Military Selective Service Act ("Act"), as amended, 50 U.S.C. App. § 453. Wayte had previously written two letters to the President expressing his opposition to draft registration and his intention not to register.

Defendant moves this court to dismiss the indictment on several bases. First, defendant urges this court to dismiss the indictment on the ground that the Government has refused to comply with this court's Order of October 29, 1982.[1]

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[1] On October 29, 1982, this court issued an Order which set out the court's rationale for making its *prima facie* finding of selective prosecution. Additionally, the October 29th Order directed that the Government provide defendant with certain documents and that Edwin Meese III, Counselor to the President, testify at the evidentiary hearing on selective prosecution. The Order specifically addressed the Government's contention that defendant should not receive any of the documents due to the Government's invocation of a qualified executive privilege.

The October 29th Order stated in part:

> The standard for determining whether an assertion of executive privilege is valid was announced in *United States v. Nixon*, 418 U.S. 683 (1974).
>
> Applying the balancing test from *Nixon* to the facts, this court finds that the scales of justice tip decidedly in favor of the defendant's right to review several of the documents which this court has inspected *in camera*. The Government's generalized assertion of a "deliberative process" executive privilege must yield to the defendant's specific need for documents, which this court has determined must be released to Mr. Wayte.

Second, the court ordered Edwin Meese III, Counselor to the President, to appear as a witness in an evidentiary hearing on selective prosecution. Mr. Meese has refused to comply with the court's order. Therefore, defendant moves the court for dismissal of the indictment as the appropriate sanction for the Government's recalcitrance.

Third, defendant asserts that the Government has not rebutted the court's *prima facie* finding of discriminatory prosecution.

Finally, defendant seeks dismissal of the indictment on the basis that the Selective Service System's draft registration regulations and Presidential Proclamation 4771 ("the Proclamation") were illegally promulgated and, therefore, invalid.

Each of defendant's asserted bases for dismissal of the indictment will be addressed.

I. Appeal Under 18 U.S.C. § 3731 In Relation To A Claim Of Executive Privilege.

As an initial matter, this court is compelled to question the Government's conduct with regard to its defiance of this court's Order of October 29, 1982. The Government contends that it is entitled to invoke the doctrine of executive privilege over both the documents this court has ordered it to make available to defendant and any subject matter that would be the basis of Mr. Meese's testimony.

This court offered to the Government the opportunity to seek the resolution of the impasse between it and the court by way of certification of the Government's claim of executive privilege for appellate review by the Ninth Circuit. The court stated that it would stay this proceeding in an attempt to encourage the Government to seek an appeal.

The Government has refused to appeal the issue of executive privilege and instead has asserted that the court does

not have the authority to provide the Government with an opportunity to appeal the court's Order. Rather, the Government argues, the only way to achieve appellate review of the Government's assertion of executive privilege is for the court to dismiss the indictment against defendant. This court disagrees with the Government's position.

In *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), the court addressed the issue of whether or not 28 U.S.C. § 1291 and 18 U.S.C. § 3731 allowed the district court to grant a former President an opportunity to appeal in light of a potential claim of executive privilege. *Id.* at 721, n.100. The court decided that the "District Court's rulings on particularized claims [of privilege] would be appealable by the . . . Special Prosecutor under 18 U.S.C. § 3731" (citations omitted).[2]

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[2]It is of particular interest to this court that *Sirica* involved issues of both civil and criminal procedure. The circuit court was quite careful to point out that the President could seek an interlocutory appeal of the District Court's rulings under 28 U.S.C. § 1291 (interlocutory appellate review in civil proceedings) while the Special Prosecutor could seek review under 18 U.S.C. § 3731 (interlocutory appellate review in criminal proceedings). *See Nixon v. Sirica*, 487 F.2d 700 at 721, n. 100.

The relevant part of 18 U.S.C. § 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court's suppressing or excluding evidence . . . if the United States Attorney certifies to the district court that appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the . . . order has been rendered and shall be diligently prosecuted.
>
> . . . .
>
> The provisions of this section shall be *liberally construed to effectuate its purposes* (emphasis added).

In light of *Sirica*, it appears well settled that the Government, in the present case, could have pursued an avenue of appeal which would have fallen far short of calling for the dismissal of the indictment. The fact that this is a criminal proceeding does not alter the situation.

II. *Prima Facie* Finding of Selective Prosecution

On September 30, 1982, this court conducted a hearing to determine whether the defendant was entitled to an evidentiary hearing on his claim of selective prosecution. To be granted an evidentiary hearing, the defendant must allege enough facts to take the question beyond the frivolous stage. *United States v. Erne*, 576 F.2d 212, 216 (9th Cir. 1978).

The defendant has clearly met this standard. During the September 30, 1982 hearing, evidence was presented that hundreds of thousands of young men have failed to register for the draft. A conservative figure would be over 500,000 men. Further, it was established that the Government has a "passive" enforcement policy, which has resulted in the indictments and prosecutions of only vocal non-registrants. The definition of vocal as used by both the Government and the defendant includes non-registrants who were reported by third parties, as well as those who were self-reported. At the time of the hearing, eleven men, including the defendant, had been indicted for failure to register.[3] These facts both demonstrated that the question was not frivolous and, further, helped to establish the *prima facie* case of selective prosecution.

Mere selectivity in prosecution, standing alone, creates no constitutional problem. *Oyler v. Boles*, 368 U.S. 448,

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[3]Since that date, two more young men have been indicted, bringing the total to thirteen. These two additional men are also vocal non-registrants.

456 (1962). The courts have established a two-prong test for establishing a *prima facie* case. The defendant must show (1) that others similarly situated generally have not been prosecuted for conduct similar to that for which the defendant was prosecuted, and (2) that the Government's discriminatory selection of defendant for prosecution was based on impermissible grounds such as race, religion or exercise of the defendant's first amendment right of free speech. *United States v. Scott*, 521 F.2d 1188, 1199 (9th Cir.), *cert. denied*, 424 U.S. 955 (1975); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

Equal protection of the laws is not limited to enacting fair and impartial legislation, but necessarily extends to the application of these laws. *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973). This basic principle was recognized by the Supreme Court long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

In *Yick Wo*, the city of San Francisco made it illegal to maintain a laundry without permission of the board of supervisors unless the laundry was located in a brick or stone building. Although the law appeared fair on its face, the facts showed that principally Chinese laundry operators were denied permission to continue using wooden facilities. The Supreme Court held that criminal enforcement of the law was therefore illegal. As the *Falk* court pointed out,

> *Yick Wo* was concerned with an abuse of discretion in the administration of a public ordinance by a city licensing board, and not with the activities of law enforcement officials who presumably prosecuted all Chinese who violated the commands of the licensing board. *The underlying principle has nevertheless been properly held to apply to the actions of prosecutors and police officials.*

479 F.2d at 618 (emphasis added).

More recently, in *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), the defendant was convicted of violating 13 U.S.C. § 221(a) by refusing to answer questions on the Department of Commerce Census Form of 1970. Steele and six other unrelated people resided in a private house in Honolulu, Hawaii. He refused to answer the census questions because it might have disclosed a violation of the Honolulu Zoning Code.

Steele raised the selective prosecution defense at his trial. Only four persons in Hawaii had been prosecuted for violating § 221(a). All four had been vocal opponents of the census and had urged the public not to comply with census requirements. *Id.* at 1150-51.

Steele attempted to prove that there were others similarly situated who had not been prosecuted. The United States Attorney's office stated that this information was not available. However, Steele located six persons who had not completed the census form and had not been prosecuted. None of these people had taken a public stand against the census. *Id.* at 1151.

A census official testified that, to the best of his recollection, the four people prosecuted were the only ones who refused to cooperate. Steele's evidence regarding the other six showed that, at the very least, the official's memory was faulty.

The Ninth Circuit reversed Steele's conviction based on selective prosecution. The census bureau had an information gathering system that should have compiled the names of all those who refused to cooperate. While the census official recollected only four people who refused to comply, the evidence suggested a minimum of ten. The court stated that this fact alone strongly suggested a questionable emphasis on census resisters. *Id.* at 1152.

The facts in *Steele* are similar to those in the instant case. Defendant has shown that the Government has the ability to locate more than one-tenth of one percent of at least 500,000 non-registrants. On July 9, 1982, a memorandum entitled "Prosecution of Selective Service Non-Registrants" was sent to United States Attorneys (Mid-Sized Offices) from D. Lowell Jensen, Assistant Attorney General, Criminal Division.[6]

In the memorandum, Mr. Jensen pointed out that the Selective Service System now has access to all Social Security records[7] and has "nearly implemented an 'active' enforcement policy," based on the use of those records to identify non-registrants. If an active system were implemented, the memorandum anticipated that Selective Service would refer massive numbers of non-registrants to the Justice Department. In that case, an appropriate selection system, probably based on "randomness," would be implemented. Random selection is a valid basis on which to justify prosecutions of non-registrants. *Steele*, 461 F.2d at 1152.

The court finds it hard to believe that the prosecutive arm of the Government, with access to Social Security records, could not locate any non-registrants other than those who were vocal in their opposition to draft registration. In fact,

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[6]Hereafter referred to as "Jensen Memo of July 9, 1982."

[7]On December 1, 1981, 50 U.S.C. App. § 462 was amended to add subsection (e). It states:

> (e) The President may require the Secretary of Health and Human Services to furnish to the Director, from records available to the Secretary, the following information with respect to individuals who are members of any group of individuals required by a proclamation of the President under section 3 [section 453 of this Appendix] to present themselves for and submit to registration under such section: name, date of birth, social security account number, and address. Information furnished to the Director by the Secretary under this subsection shall be used only for the purpose of the enforcement of this Act.

the Government concedes that if and when an active enforcement program is implemented, it has the ability to select men to prosecute based on randomness.

General Thomas K. Turnage, director of the Selective Service System, also remarked on the Government's ability to identify non-vocal non-registrants. In a statement prepared for presentation on July 28, 1982 to the Subcommittee on Courts, Civil Liabilities and the Administration of Justice of the House Judiciary Committee, General Turnage stated that "[i]n August, we start realizing the results of a more active compliance program with the ultimate goal of identification of all non-registrants. This program involves matching our Selective Service registrant files with files of the Social Security Administration."

Further, at the present time, when the active enforcement system has not yet been put in place, the court cannot accept the Government's disingenuous argument that it has prosecuted all known non-registrants. It strains credulity to believe that the investigative agencies of our Government, especially the Federal Bureau of Investigation, could not locate any non-vocal non-registrants.[8] The inference is strong that the Government could have located non-vocal non-registrants, but chose not to. For example, non-registrants could be located by using motor vehicle registration records in many states.

The defendant has also met the second prong of the *prima facie* test. In *Steele*, the court stated that "[a]n enforcement procedure that focuses upon the vocal offender is inherently

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[8]A law student working for the defense phoned four states at random (Iowa, Michigan, Texas and Colorado) in an effort to see whether a list of eighteen-year-old persons was available. The law student found that such lists were easily obtainable. By comparing these lists with the Government's list of men who have actually registered, one should be able to identify non-vocal non-registrants.

suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right." *Id.* at 1152. At the time of the September 30, 1982 hearing, all eleven men indicted under the Government's passive enforcement program were vocal opponents of draft registration.

Mr. Jensen's July 9, 1982 memorandum is again illuminating in this regard. He stated that the Justice Department's prosecutive policy is designed to insure that only persons who are most adamant in their refusal to register will be prosecuted. Under the passive enforcement program, non-registrants come to the attention of Selective Service by either reporting themselves or having others report them. Therefore, according to Mr. Jensen, the first prosecutions were liable to consist largely of persons who publicly refused to register. This would raise "thorny selective prosecution claims."[7]

Mr. Jensen underestimated the effect of the passive enforcement program. At the time of the hearing, and continuing until the present time, persons prosecuted for failing to register have consisted *solely*, not largely, of vocal non-registrants. Mr. Jensen's memorandum shows that the Government was aware of the consequences of its passive enforcement policy. The inference is manifest that the defendant has been singled out for prosecution because he exercised his first amendment right to free speech.

Additionally, it is the opinion of this court that the Government's normal prosecutorial sequence was not followed in this case. The Department of Justice is the agency charged with the responsibility for deciding who will be prosecuted. After receiving names of young men from the Selective

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[7] Jensen Memo of July 9, 1982.

Service System, the names would be transmitted to the appropriate United States Attorney. Ordinarily, it is the U.S. Attorney who would ultimately decide which non-registrants to prosecute.

It is clear to this court that agencies other than Selective Service and the Department of Justice have been involved in most of the decisions relating to prosecutions of non-registrants. A nexus has been established between the White House, through Edwin Meese III, Selective Service, and the Department of Justice. Mr. Meese is also a member of the Presidential Military Manpower Task Force ("Task Force"), an agency established to advise the President on military personnel matters. Numerous documents disclosed to the defendant by the Government indicate White House interest in the prosecution of non-registrants.

Both Mr. Meese, as an individual, and the Task Force were concerned with questions regarding "prosecutorial discretion." They also expressed concern with respect to the possible consequences of the policy the Government would choose to pursue. The involvement of Mr. Meese and the Task Force in prosecutorial policy decisions creates, at the very least, a strong inference of impropriety with regard to the Government's motive in seeking the prosecution of this defendant, and others similarly situated.

Once this court found that a *prima facie* case of selective prosecution had been established, the burden shifted to the Government to prove that its policy was not based on impermissible selective prosecution. The Government has failed to meet its burden.

On October 7, 1982, the court held a pre-trial evidentiary hearing on the matter of selective prosecution. At the hearing, the Government called David J. Kline, Senior Legal Advisor in the General Litigation and Legal Advice Section

in the Criminal Division of the United States Department of Justice. Mr. Kline's function is to render advice on and supervise the administration of certain federal statutes, among them 50 U.S.C. App. § 415 *et seq.*

Mr. Kline testified and documents were introduced through him at the hearing. In addition, the Government submitted affidavits of D. Lowell Jensen, Edward Frankle, former Associate Director, Selective Service System, Thomas K. Turnage and David J. Kline. Richard Romero, the Assistant U.S. Attorney prosecuting this case, also testified at the hearing. This constituted the Government's only attempt to rebut the *prima facie* finding.[9] After hearing Mr. Kline's testimony and examining the documents submitted by the Government, this court was convinced that the *prima facie* finding had not been rebutted. These documents were all introduced into evidence and disclosed to the defendant. There was no objection by the Government to having any of these documents examined by the court or the defendant.

In preparation for the evidentiary hearing, the defendant requested that the Government produce certain additional documents and witnesses. After numerous orders by this court to produce these documents and witnesses, the Government declined to do so. The Government has based its refusal on a claim of executive privilege.

Since the Government had the burden of rebutting the *prima facie* case of selective prosecution, its refusal to comply with this court's orders reflects a curious strategy. It also raises serious questions as to whether the Government has pursued this case in good faith.

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[9] Edward Frankle was scheduled to testify for the Government at the evidentiary hearing. As a result of time constraints, Mr. Frankle was not called to testify on October 7, 1982. He ultimately did not testify because the evidentiary hearing was never resumed.

There is an obvious problem of proof whenever a defendant raises selective prosecution claims. There is a presumption that a prosecution for violation of a criminal law is undertaken in good faith and in a non-discriminatory fashion. *Falk*, 479 F.2d at 620. However, when a defendant alleges intentional discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's motive, the presumption is questioned. *Id.* at 620-621.

The circumstances of the *Falk* case, which led to a *prima facie* finding of selective prosecution, are particularly relevant in this case. First, Falk was actively involved in counseling others on legal methods to avoid military service in Vietnam. Similar circumstances, in which a vocal dissenter was exercising his first amendment rights, led the *Steele* court to find selective prosecution.

One indication that Falk was prosecuted for exercising a constitutionally protected right was the chain of officials that approved Falk's indictment. In addition to the Assistant U.S. Attorney who prosecuted Falk, the indictment was also approved by the Chief of the Criminal Division of the U.S. Attorney's Office, the First Assistant U.S. Attorney, the U.S. Attorney and the Department of Justice in Washington. The *Falk* court doubted that the usual procedure for prosecuting a draft case required such careful consideration from such a distinguished succession of officials. *Id.* at 622.

Wayte, like Falk, was actively involved in opposing draft registration. Wayte has written two letters to the President and given interviews to numerous media regarding his opposition to draft registration. Notwithstanding the assertions of the Government to the contrary, the list of officials involved in the prosecutive policy concerning non-registrants in the instant case is much more impressive than that in *Falk*. The list begins with Mr. Meese and other White House staff. It continues with the Task Force, which includes,

among others, Mr. Meese, the Secretary of Defense, the Director of the Office of Management and Budget, the White House National Security Advisor, the Chairman of the Joint Chiefs of Staff and the Director of Selective Service. Of the officials mentioned, it is apparent to this court that Mr. Meese was most prominently involved in the entire process. Furthermore, the Justice Department in Washington, D.C. was also obviously involved in the process. Finally, and appropriately, in the case of this defendant, the U.S. Attorney's office for the Central District of California actually sought the indictment. As in *Falk*, the involvement of high Government officials in enforcement and prosecution decisions regarding non-registrants strongly suggests impermissible selective prosecution.

The *Falk* court was concerned with selective prosecution as it focused on one individual. The court emphasized that the officials mentioned had approved Falk's indictment. The circumstances in this case are different from *Falk*. The constitutional infirmity in the Government's passive enforcement system itself. It is important to emphasize that no party in this case, nor this court, has ever suggested that the White House (through Mr. Meese or any staff) or the Task Force were involved in the decision to prosecute this particular defendant.

However, this court is troubled by the fact that the Government's passive enforcement program leads only to indictments of vocal non-registrants.[9] The Government was very conscious of the effect its passive enforcement policy would have on non-vocal non-registrants. In a statement that says much about the Government's attitude, one high Justice Department official stated, in a March 2, 1982 letter

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[9] Of the thirteen men who have been indicted, twelve have been self-reported and one has been reported by others.

to Selective Service, that "the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning."[10] Although Mr. Jensen signed this letter, the above quoted phrase was drafted by Mr. Kline.[11] This is the same individual who testified as the Government's major witness in its brief attempt to rebut the finding of a *prima facie* case.

The March 2, 1982 letter recognized the passive program had potentially serious first amendment problems that would lead to selective prosecution claims. The Government was well aware of the *Falk* decision. The letter stated:

> In order to avoid the risk of initial losses of non-registrant cases and the probable consequences of diminishing registrations, we believe that Selective Service must create a program of active identification which will be functioning, or well on the way toward functioning, at the time of the first non-registrant prosecution.[12]

This, it has not done. Although the Government knew about the problems with the passive enforcement program, it chose to implement it. The Government must now accept the consequences of that choice.

There are other references to Government motives that cannot be reconciled with permissible prosecutorial discretion. The documents actually received into evidence in this case are replete with instances of discussions regarding the cost of the enforcement programs. Mr. Meese was particularly concerned with this topic. Obviously, the passive

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[10] Letter dated March 2, 1982 from D. Lowell Jensen, Assistant Attorney General, Criminal Division to Herbert C. Pieschek, Associate Director, Plans and Operations, Selective Service System. (Hereafter "Jensen Letter of March 2, 1982.")

[11] R.T., October 7, 1982 at 53.

[12] Jensen Letter of March 2, 1982.

program was less expensive to implement. Although an active enforcement program has been considered by the Government for about a year and a half, it is not yet in operation. An effort by the Government to save money is not adequate justification for violating a person's first amendment rights.

Numerous references have also been made regarding the effect of the first prosecutions on other non-registrants. It was felt that the first wave of prosecutions would encourage other non-registrants to register. Since the passive program was designed to prosecute only those most adamant in their refusal to register, inducting only vocal non-registrants made tactical sense. This would presumably have the greatest impact and result in significant numbers of men registering for the draft. However, as *Steele* and *Falk* make clear, this policy violates the first amendment rights of the vocal non-registrants by selecting them, alone, for prosecution. The government still retains a significant amount of prosecutorial discretion in deciding whom to prosecute. There is nothing in this decision to suggest otherwise. When this discretion is exercised, it must be done in a non-discriminatory manner.

While the Government refused to turn over certain documents to the defendant, it did make these documents available (in expurgated form, initially) to this court for an *in camera* inspection. After scrutinizing these documents, the court is reinforced in its belief that the nexus between the White House, through Mr. Meese, Selective Service, the Task Force and the Department of Justice, which existed at the time the *prima facie* finding was made, is still extant.

After carefully analyzing the arguments advanced by both parties, this court has determined that the *prima facie* finding has not been rebutted. Therefore, this court must grant defendant's motion to dismiss the indictment on the basis of the Government's policy of selective prosecution.

III. *Selective Service Registration: Statutory Scheme*

Defendant contends that the Military Selective Service Act ("Act"), 50 U.S.C. App. §§ 451 *et seq.*, standing alone, does not establish the basis for criminal liability for one who refuses to register. In pertinent part, 50 U.S.C. App. § 453 provides:

> Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner as *shall be determined by proclamation of the President* and by *rules* and *regulations* prescribed hereunder . . .

(emphasis added).

As indicated above, Congress expressly provided both that the executive branch should determine the appropriate time, place and manner for registration and that such decisions be expressed in rules, regulations and proclamations. In this case at bar, the indictment itself charges defendant with refusing to register "pursuant to the Military Selective Service Act, *rules* and *regulations* duly made pursuant thereto, and Presidential Proclamation 4771 of July 2, 1980" (emphasis added). Congress intended that the Act merely be the foundation upon which to anchor a "statutory scheme."

Defendant cites three cases which address the role of regulations in the completion of a statutory scheme. Of the three cases, *United States v. Mersky*, 361 U.S. 431 (1960), is the most authoritative.

In *Mersky*, an information charged appellees with having violated 19 U.S.C. § 1304. *Id.* at 432. The District Court dismissed the information on the ground that the acts by

defendants had not violated § 1304 because the applicable regulation was not sufficiently clear to justify a criminal prosecution. *Id.* at 433. The Government's appeal went directly to the Supreme Court. *Id.*

On the issue of the relationship between statutes and regulations, the Court stated:

> An administrative regulation, of course, is not a statute. While in practical effect regulations may be called little laws, they are at most but offspring of statutes. . . . Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of the command. . . . Once promulgated, these regulations called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that *neither the statute nor the regulations are complete without the other, and only together do they have any force*.

Id. at 437-38 (emphasis added). Furthermore, the Court held that "when the statute and regulations are so inextricably intertwined," the statutory scheme in its entirety will be subject to judicial scrutiny. *Id.* at 438.

Applying *Mersky* to the present case, defendant's argument that the court should view the applicable statute, regulations and proclamation as one statutory scheme is well founded.

Defendant has cited both *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981) and *Batterton v. Francis*, 432 U.S. 416 (1977), as further support for his contention that regulations play an integral role in the overall statutory scheme. Both cases view administrative regulations as having "legislative effect" when it is clear that the regulations implement the

congressional intent which gave rise to a particularstatute. *Schweiker*, 453 U.S. at 43-44; *Batterton*, 432 U.S. at 425.

It is apparent that this court must read the Act in conjunction with both the regulations found at 32 C.F.R. Part 1615 and Presidential Proclamation 4771 in order to ascertain whether the entire "statutory scheme" involving draft registration is valid.

A. The Registration Regulations at 32 C.F.R. Part 1615 and Executive Order 12044.

Defendant argues that the draft registration regulations were subject to the sixty-day notice and comment requirements of Executive Order 12044 rather than the normal thirty-day notice and comment period provided by the Act itself.[11]

Defendant contends that the initial decision of then Acting Director of the Selective Service, Robert Schuck, to comply with Executive Order 12044's sixty-day notice and comment period should be given the force and effect of law.[12] Fur-

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[11] In the relevant part, 50 U.S.C. App. § 463(b) provides that "no regulation issued under the [Military Selective Service] Act shall become effective until . . . thirty days following the date on which such legislation has been published in the Federal Register."

[12] On October 31, 1978, Acting Director Schuck issued a report which stated: "In accord with Executive Order 12044, at least 60 days will be allowed for comment on proposed regulations in the future." 43 Fed. Reg. 50981.

Executive Order 12044 provides, in pertinent part:

> Section 1 *Policy*. Regulations shall be as simple and clear as possible. . . .
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> To achieve these objectives, regulations shall be developed through a process which ensures:
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> . . . .
>
> (c) opportunity exists for early participation and comment by other federal agencies, State and local governments, . . . and individual members of the public;
>
> . . . .
>
> Section 2 *Reform of the Process for Developing Significant Regulations*.

thermore, defendant argues that acting Director Schuck's subsequent decision to allow thirty-two rather than sixty days for notice and comment, prior to the promulgation of the registration regulations, should lead the court to invalidate the provisions of the executive order and enforce the regulations.

The Government counters that the court has neither the jurisdictional authority to review the provisions of Executive Order 12044, nor the authority to enforce them. This court rejects the Government's first contention and accepts the second.

The Government appears to have confused the issue of the *enforcement* of executive orders with the more fundamental question of whether *judicial review* of executive orders is appropriate. The primary authority cited by the Government in support of its position, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), refutes the very principle which the Government urges this court to accept.

In *Chrysler*, the Court examined Executive Orders 11246 and 11375, which charged the Secretary of Labor with the responsibility of ensuring that Government contractors provide equal employment opportunities. *Id.* at 286. The Sec-

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. . . .

(c) *Opportunity for Public Participation.* Agencies shall give the public an early and meaningful opportunity to participate in the development of agency regulations. . . . Agencies shall give the public at least 60 days to comment on proposed significant regulations. In the few instances where agencies determine this is not possible, the regulation shall be accompanied by a brief statement of the reasons for a shorter time period.

. . . .

Section 6 *Coverage.*

. . . .

(b) This Order does not apply to: . . . (2) regulations issued with respect to a military or foreign affairs function of the United States.

retary of Labor promulgated regulations which required government contractors, such as Chrysler, to furnish reports and other information regarding their affirmative action programs and the composition of their work forces. *Id.*

The Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") promulgated regulations which required Chrysler to make certain documents available to the OFCCP's compliance agency. Additionally, the regulations provided public disclosure of information from OFCCP files. *Id.* at 284. It is the voluntary promulgation of the disclosure regulations, made pursuant to the executive orders, which the Government analogizes to Acting Director Schuck's voluntary embracement of the sixty-day notice and comment period.

The Government, at one point in its opposition papers, argues that *Chrysler* stands for the proposition that regulations and executive orders which do not have a statutory foundation are not reviewable by an Article III court.[17] However, a mere three sentences from that assertion is an acknowledgement by the Government of the fact that the Supreme Court did, indeed, review both the regulations in question and related executive orders. Clearly, an Article III court is not proscribed from reviewing the question of the enforceability of an executive order, irrespective of an attempt by the executive branch to make review an intra-branch function.[18]

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[17] *See* Government's Opposition to Defendant's Motion to Dismiss re Illegal Promulgation of Selective Service regulations and Presidential Proclamation 4771, Memorandum of Points and Authorities, at 6-8.

[18] "Summary and Analysis of Public Comments" for Executive Order 12044 which asserts that the enforcement of Executive Order 12044 rests with the Office of Management and Budget within the Executive Branch. Here again, the Government attempts to buttress its arguments against judicial review with a comment concerned with judicial enforcement.

The Government also relies heavily on *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), and its progeny as support for its position on judicial review of Executive Order 12044. In *Gronouski*, the President issued Executive Order 10988 in an attempt to further his personal policy of enhancing the attractiveness of federal employment. *Id.* at 452.

Gronouski, like *Chrysler*, addressed the enforceability rather than the judicial reviewability of executive orders. The Government's assertion that *Gronouski* is irreconcilable with the concept of judicial review of executive orders must be rejected.

This court questions whether the Government is sincere in its position regarding judicial review of executive orders. The Government's position, if accepted by this court, would result in the vesting of exclusive jurisdiction over the question of the enforceability of executive orders within an Article I agency (the Office of Management and Budget). To accept such a position would cut against the very fabric of the Constitution which mandates that, in cases such as the one at bar, it is the province of an Article III tribunal, rather than the Office of Management and Budget, to review the question of the enforceability of the executive pronouncement. *Cf. Marbury v. Madison*, 5 U.S. 87, 111, 1 Cranch 137, 176 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").

Turning to the question of enforcement itself, this court agrees with the Government that the President alone has the authority to enforce the sixty-day notice and comment provision of Executive Order 12044. The court concurs with the Government's assertion that Executive Order 12044 is without a statutory genesis. Absent the requisite legislative foundation, the executive order is without the force and effect of law. Therefore, its enforcement is subject to the

discretion of the President. The following cases, when read together, stand for the proposition that executive orders without a legislative genesis have no legal force and effect.

In *Gronouski*, the court addressed the question of whether the Postmaster General had violated Executive Order 10988. The court stated that the executive order in question had merely established a "broad policy," and that it was the responsibility of the Postmaster General to decide how to implement that policy. In addition, the court stated that the executive order

> had no specific foundation in Congressional action. . . . It represented simply one President's effort to move in the direction of what had been advised by his experts would be an improvement in the efficiency of federal government. . . . [The] action [by the Postmaster General] does not seem to us to conflict with the Executive Order. But, even if it did, it does not follow that appellants have a right of such a nature as to warrant intervention by an equity court.

Id. at 456-57.

Next, the Seventh Circuit addressed the question of whether executive orders have the force and effect of law. In *Stevens v. Carey*, 483 F.2d 188 (7th Cir. 1973), a federal civil service employee brought an action against a federally recognized union that expelled her from membership. *Id.* at 189.

The court addressed the issue of whether "Executive Orders, like congressional enactments, have the force and effect of 'laws . . . of the United States.' " *Id.* at 190. The court stated that in those cases in which executive orders have been granted the force and effect of law, they had been issued "pursuant to statutory authority." *Id.* Finding an absence of the requisite statutory authority in *Carey*, the court held that the executive order in question was without

the force and effect of law. *Id.* at 190-91.

Other circuits have stated similar views. In *Local 1498, American Federation of Government Employees v. American Federation of Government Employees, AFL-CIO*, 522 F.2d 486 (3d Cir. 1975), the district court denied plaintiffs leave to sue under the Labor-Management Reporting Disclosure Act of 1959. *Id.* at 487-88. Plaintiffs appealed, and the court of appeals affirmed holding, *inter alia*, that the executive order was not a "law of the United States." *Id.* at 490-91.

The Third Circuit found:

> [The executive order] was not issued under the statutory authority providing for presidential implementation or effectuation of statutory provisions. . . . Hence, while Executive Order No. 11491 regulates and implements federal government personnel policies, *it does so solely as a product of executive authority and not as a consequence of congressional law making*. Accordingly, this Executive Order . . . cannot attain the status as [sic] a "law of the United States."

Id. at 491 (emphasis added).

In *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir.), *cert. denied*, 424 U.S. 966 (1975), plaintiffs sought declaratory and injunctive relief against the implementation of federal Department of Agriculture regulations. *Id.* at 231. The district court granted a permanent injunction and defendants appealed. *Id.* The court of appeals dissolved the injunction holding, *inter alia*, that the executive order involved in the case did not have the force and effect of law. *Id.* at 236.

The court reiterated the general rule that "Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. *Id.* at 234 (citations omitted).

After an historical analysis of the intent of the framers of the United States Constitution, the court found that the President may not "act as a lawmaker in the absence of a delegation of authority or mandate from Congress." *Id.* at 235. The court went on to hold that in enacting Executive Order 11821, the President had not been responding to a congressional delegation of lawmaking authority. Therefore, Executive Order 11821 was not given the force and effect of law. *Id.*

The most recent case on point comes from the Fourth Circuit. In *Liberty Mutual Insurance Company v. Friedman*, 639 F.2d 164 (4th Cir. 1981), certain insurance companies challenged the district court's conclusion that the companies were government subcontractors and, thus, subject to certain requirements of Executive Order 11246. *Id.* at 165. After a lengthy analysis of possible statutory bases for Executive Order 11246, the court of appeals reversed, concluding that the Order 11246, the court of appeals reversed, concluding that the Order was not authorized by Congress. *Id.* at 172. The court held that in the absence of congressional authority, the executive order was without the force and effect of law. *Id.*

Furthermore, in a footnote, the court stated that the possibility that authorization for the executive order might be found independently of a statutory source in the "inherent powers" of the President "is completely foreclosed by *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952) . . . ." *Liberty Mutual*, 639 F.2d at 172 n.13, citing *Youngstown*, 343 U.S. at 587. In *Youngstown*, the Court held that the "inherent powers of the President," under his authority as Commander-in-Chief, did not support his executive order directing seizure of the steel mills during the Korean conflict. The Court found the President's action to be legislative in nature, and, in the absence of any del-

egation of lawmaking authority from Congress, none could be inferred. *Id.* at 172.

Applying the holdings of the above-cited cases to the present case, the court must first find that Executive Order 12044 was issued pursuant to statutory authority before this court may enforce the sixty-day notice and comment provision against the Selective Service. On the face of the executive order there is no mention of any underlying statutory basis. This court is unaware of *any* statute which serves as a foundation for the executive order.

The Director of Selective Service had no more than an obligation to issue regulations after a thirty-day notice and comment period. His decision to allow thirty-two days, rather than sixty days, is not a proper matter for judicial concern. Absent a clear and definite legislative genesis upon which to anchor the executive order in question, the decision to enforce the order's provisions rests with the Chief Executive rather than with the judicial branch.

Therefore, defendant's motion to dismiss the indictment due to the illegal promulgation of the registration regulations must be denied.

B. Presidential Proclamation 4771

Defendant contends that the Proclamation announced, on its face, that it was effective immediately upon publication and that the initial registration period began a mere three weeks from the publication date. Defendant argues that the Proclamation was subject to the thirty-day notice and comment requirement prescribed by the Act, 50 U.S.C. App. § 463(b). In enacting § 463(b), Congress provided that "no regulation issued under the Act shall become effective until thirty days following the date . . . such regulation has been published in the Federal Register."

Interestingly, the Government does not dispute the fact that if the Proclamation had been a regulation, it clearly would have been subject to the thirty-day notice and comment requirement. However, the Government argues that Congress did not intend to include presidential proclamations within the requirements of § 463(b) because the word "proclamation" did not appear on the face of the statute. Defendant argues that where Congress envisions a statutory scheme, i.e., a statute to be accompanied by rules, regulations and proclamations, it is reasonable to infer that Congress intended to subject both regulations *and* proclamations to the same notice and comment requirements.

During the debate in Congress over the enactment of § 463(b), Senator McIntyre, who co-sponsored the measure, stated that:

> Presently the Selective Service System issues the bulk of its regulations in the form of executive orders. The remainder are issued by the Director. Although these regulations are published in the Federal Register, they are effective on the date they are issued. *This poses a problem because it gives no lead time for persons who are affected by the regulations to become aware of them . . . . The Amendment under consideration would correct the possibility of this kind of occurrence.*

117 Cong. Rec. 20487 (June 17, 1971) (emphasis added).

Numerous courts have held that presidential proclamations, executive orders and administrative regulations all have the force and effect of law when accompanied by the proper statutory foundation.[17] Each of these courts has seen

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[17] In fact, almost without exception, each of the courts in the above-cited cases concerning the legal effect of Executive Order 12044 has mentioned in dictum its support for such a proposition. *Cf. Liberty Mutual*, 639 F.2d at 167; *Independence Min Packers*, 538 F.2d at 234; *Local 1498*, 522 F.2d at 491; *Carey*, 483 F.2d at 190-91; *Greenwalt*, 350 F.2d at 458.

fit to use the terms "rules," "regulations," "orders," and "proclamations" interchangeably when the particular facts of cases before the courts called for the court to do so.

One example is provided by *Hampton and Co. v. United States*, 276 U.S. 394, 406 (1928), in which the court characterized a presidential proclamation as a lawful exercise of the President's discretion to make "public regulations" interpreting a statute. Furthermore, two district courts have ruled on the interpretation of the term "regulation" in 50 U.S.C.App. § 463(b).

In *Piercy v. Tarr*, 343 F. Supp. 1120 (N.D. Cal. 1972), plaintiffs were selective service registrants who were classified as conscientious objectors by the Selective Service System. *Id.* at 1121. Plaintiffs argued that the promulgation by the Selective Service of certain informal "directives" was contrary to the mandatory pre-publication requirements of § 13(b) of the Act and the implementing executive order. *Id.* The district court found for plaintiffs and issued a permanent injunction which prevented the defendant from enforcing the civilian work order in dispute. *Id.* at 1129.

On the issue of whether "directives" from the Director of Selective Service are subject to the notice and comment requirements for "regulations," the court held:

> [T]he directives here involved, which purported to alter significantly the rules and regulations . . . , are required to be published in conformity with [50 U.S.C. App. § 463(b)].
>
> . . . .
>
> . . . [I]t matters little whether [the] directive is a "rule", an "order", or a set of "instructions", or only a sui generis "directive". . . . . The court cannot hold that the publication requirements of the Act hinge on the particular format the Selective Service System chooses to issue authoritative instructions couched in mandatory terms.

Id. at 1128. The court refused to allow defendants the opportunity to "rely on the narrow reference to 'regulations' in . . . 50 U.S.C. App. § 463(b)" as a basis for avoiding its mandate. *Id. See also Gardner v. Tarr*, 341 F. Supp. 422 (D.D.C. 1972) (declarations of policy with force and effect of law are subject to the notice and comment requirements of § 463(b) even though not "rules" or "regulations").

Likewise, in the case at bar, this court rejects the Government's contention that because the Proclamation is not a "regulation," it is not subject to the notice and comment requirements of § 463(b). This court will refrain from engaging in the semantic gymnastics that the Government offers. Simple logic dictates that, in light of the facts of this case, "proclamation" should be read as "regulation" for the purposes of the notice and comment requirement of § 463(b).

On the very face of the Proclamation, President Carter declares that he is issuing the proclamation "by the authority vested in me by the Military Selective Service Act." 45 Fed. Reg. 45247 (July 2, 1980). Along with the congressional grant of authority cited by President Carter came the responsibility to guarantee a thirty-day period prior to the final publication of the proclamation for notice and comment. Absent an effective waiver by the President of the notice and comment requirement, the noncompliance with § 463(b)'s prescription provides a basis for invalidating the provisions of the Proclamation.

The Government argues that if the notice and comment provision is applicable to presidential proclamations, it was waived by President Carter. Section 463(b) provides, in part:

> The requirements of this subsection may be waived by the President in the case of any regulation if he

(1) determines that compliance with such regulations would materially impair the national defense, *and* (2) gives public notice to that effect at the time such regulation is issued.

(Emphasis added).

The Government argues that President Carter's statements regarding Afghanistan and the Soviet Union were made in an effort to provide public notice of the fact that he was waiving the thirty-day notice and comment requirement.[6] This court does not agree with the Government's contention that statements made by President Carter, at the time he issued Presidential Proclamation 4771, amounted to a clearly articulated and legally sufficient waiver of the notice and comment requirement.

Finally, the Government advances the meritless argument that, even assuming President Carter should have complied with § 463(b), any error resulting from his failure to comply was made in "good faith," and, hence, it should be disregarded. The Government does not address the fact that the "harmless error" argument appears particularly ill-conceived in the context of a criminal prosecution involving one who allegedly defied the proclamation at issue. Irrespective of whether the error was made in good faith, it could hardly be characterized as "harmless error." This court cannot accept the Government's final argument.

The court recognizes the widespread effect that a decision granting defendant's motion to dismiss due to the illegal promulgation of the Proclamation will have on this nation's selective service registration program. However, justice

[6] Upon signing Presidential Proclamation 4771, President Carter stated that he was "deeply concerned about the concerted and vicious invasion of Afghanistan by the Soviet Union and occupation by them of this innocent and defenseless country . . . ." 16 Weekly Compilation of Presidential Documents 1279 (1980).

compels the court to grant defendant's motion. The proclamation in question was neither expressly nor impliedly exempted from the thirty-day notice and comment requirement of § 463(b). The court cannot close its eyes to the fact that the proclamation became effective a mere twenty-one days after it was published. What might appear a minor breach of the mandate of § 463(b) takes on far greater significance in the context of criminal liability emanating from a defective component of the the draft registration's statutory scheme.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss is granted and the indictment shall be dismissed. The dismissal is with prejudice, and is based on a finding of discriminatory prosecution. As a separate and independent basis for dismissal of the indictment, this court has found the time, place and manner requirements of Presidential Proclamation 4771 are invalid.

Dated: November 15, 1982

TERRY J. HATTER, JR.
United States District Judge

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mark Alden SCHMUCKER,
Defendant-Appellant.

No. 82-3701

United States Court of Appeals,
for the Sixth Circuit.

Decided and Filed November 25, 1983.

On Appeal from the United States District Court for the Northern District of Ohio.

Before: Merritt, Circuit Judge; Phillips, Senior Circuit Judge; Spiegel,* District Judge.

Merritt, Circuit Judge. In this direct criminal appeal, we address only this issue: Did the District Court err in denying the defendant an evidentiary hearing to determine whether he was indicted for failure to register for the draft because of his exercise of first amendment rights. We reverse and remand for the evidentiary hearing requested.

I.

Under the terms of Presidential Proclamation 4711, issued by President Jimmy Carter on July 2, 1980, males like the defendant residing in the United States, born in the calendar year 1960, were required to register with the Selective Service during the period July 21-26, 1980. The defendant, who is concededly a sincere Mennonite, mailed to the Selective Service a letter in August, 1980, advising the government of his intention not to register for the draft and objecting to the registration. He explained that registering

*The Honorable S. Arthur Spiegel, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

would violate his religious convictions. He included his name, current and permanent address, and his age eligibility. He rejected efforts by the Federal Bureau of Investigation and a government attorney to persuade him to register.

The Grand Jury returned a one-count indictment charging that defendant knowingly and willfully failed, evaded, and refused to submit to registration, in violation of 50 U.S.C. §§ 453 and 462. On October 5, 1982, the jury returned a verdict of guilty.

Defendant assigns many errors in the conduct of his trial, including the claim that the District Court refused to conduct an evidentiary hearing on his claim that the government abridged his rights of free speech and religious free exercise by prosecuting only those persons who both (a) refused to register *and* (b) publicly expressed disagreement with the draft registration law. We conclude that defendant Schmucker is entitled to a hearing on his charge of selective prosecution. Accordingly, we reverse.

II.

Defendant claims that hundreds of thousands of young men have not registered but that only those who have publicly disagreed with the registration law have been prosecuted. The government responds that no constitutional violation has occurred because the government may validly select for prosecution only protestors who call attention to themselves by publicly confessing their failure to register. The government argues that the District Court, therefore, correctly denied the defendant's motion for an evidentiary hearing on this issue because his claim of selective prosecution does not state a valid defense, even assuming the facts alleged to be true.

In *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983), we recently set out a two part test governing when

an indictment must be dismissed on grounds of selective prosecution. Under the test an indictment must be dismissed if (1) the defendant has been "singled out" while other similarly situated violators are left untouched, and (2) the defendant's selection for prosecution was "based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights." A defendant is entitled to an evidentiary hearing if he makes a preliminary showing that there is a legitimate issue concerning the government's conduct under this standard.

Although prosecutorial discretion is very broad under our system, *see Oyler v. Boles*, 368 U.S. 448 (1962); *Confiscation Cases*, 74 U.S. 454, 457 (1868) ("public prosecutions . . . within exclusive discretion of" prosecutor), it is obvious that the government cannot selectively enforce a law by prosecuting only Republicans, or only Caucasions, or only Southerners who violate the law. For the government cannot adopt a prosecution policy which, if adopted by Congress as a statute, would be unconstitutional. The first issue before us then is whether the government may prosecute only those who publicly express their conscientious refusal to obey the registration law while leaving aside all who engage in covert refusal to obey and unadvertised evasion of the law? If the answer to that question is no, the second issue is whether we should require an evidentiary hearing on the present record.

III.

The government seems to agree for purposes of argument that the defendant may be able to show at an evidentiary hearing that prosecution is limited to dissenters who publicly confess their resistance to the registration law. The defendant claims, and apparently the government does not deny, that of the approximately half million young men who have

failed to register for the draft, only thirteen had been indicted by November, 1982, each of whom had expressed his opposition to the law by letter to the government or public speech. Moreover, on March 19, 1982, Mr. Lawrence Lippe, Chief of the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice, wrote a memorandum to Mr. D. Lowell Jensen, Assistant Attorney General in charge of the Criminal Division, describing the government's prosecutorial policy in the cases as a "passive enforcement" policy based on "self reporting." He says the group of "self reporters" consists of Mennonites and "others with religious or moral objections" and "vocal proponents of nonregistration." Mr. Lippe advised his superior that the "present scheme" of prosecution of only "the vocal nonregistrant will undoubtedly result in allegations that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights."

The question before us then is whether a prosecutorial policy violates the first amendment if it is directed solely at "the vocal non-registrant" who openly objects to the law on religious, moral or political grounds. If so, the defendant is entitled to an evidentiary hearing in order to see if he can prove his allegations. If not, no evidentiary hearing is necessary.

IV.

A prosecutorial policy so limited clearly violates the first amendment. It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strength of their convictions. It excludes, and therefore rewards, thousands who engage in covert noncompliance and evasion of the law, including all those who would confess their violation if sought out and interviewed. It discourages dissenters from expressing their

criticisms of government policy.

The government's main argument is that the defendant has failed to establish that his selection "was based on an impermissible criterion." It argues that although the defendant "conjectures that the decision to prosecute him was deliberately based on the exercise of his first amendment rights, the record clearly demonstrates that the appellant has been prosecuted simply because he took it upon himself to report his own criminal misconduct to the Selective Service and has, since the time of his incriminating correspondence to the government, rejected the various opportunities extended to him to register and thereby avoid criminal liability." This argument in turn depends on the acceptance of the government's argument that the defendant's letter "was not simply an exercise of the right to petition the government to protest perceived wrongs." The letter was, in addition, an unequivocal confession of the commission of a crime which virtually invited the initiation of criminal prosecution. (Govt. Brief pp. 37-38.)

The trouble with this prosecutorial selection distinction is that a law punishing only draft nonregistrants who publicly confess by vocalizing their disagreement with the government's policies would violate the principle that "Congress shall pass no law abridging free speech." Like the Alien and Sedition Acts, such a law visits punishment on people solely because they have expressed rather than remained silent about their opposition to the government. It is no less a violative of the first amendment for the Executive Branch to give the draft registration law this construction for purposes of prosecution. As Professor Tribe has noted, "in the very controversy over the Alien and Sedition Acts . . . a powerful theory of first amendment freedoms first crystallized . . . [viz.] that government lacks constitutional power to silence its critics." L. Tribe, *American Constitutional*

Law § 12-12, at 632 (1978).

The government is correct that it can validly pass a law prohibiting fraud and libel based on speech and may perhaps be able to limit prosecutions generally or in certain classes of cases to those involving people who have made confessions. Such laws, though punishing speech, are content neutral. The government may not, however, limit its punishment in fraud, libel, and confession cases to only those cases in which the defendant criticizes the government and its policies. That standard is not content neutral. *See generally Oyler v. Boles*, *supra*; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Similarly, a law is not content neutral that limits draft prosecutions to nonregistrants who "vocalize" their religious, moral or political objections to the government. The government lacks the power to adopt a stated policy of prosecuting people who publicly confess their failure to register in confessions which criticize government policy.

A government's prosecution policy must be content neutral unless there are compelling justifications. In *Carey v. Brown*, 447 U.S. 455 (1980), in striking down a state statute that generally banned picketing of residences or dwellings but did not prohibit peaceful labor picketing of a place of employment, the Supreme Court declared that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Id.* at 461-62. *See also Widmar v. Vincent*, 454 U.S. 263 (1981); *United States v. O'Brien*, 391 U.S. 367 (1968). In *United States v. Falk*, 479 F.2d 616, 623 (7th Cir. 1973) (en banc), the Court of Appeals applied similar reasoning to a selective prosecution case when it concluded that "it is clearly unconstitutional to enable a public official to determine which

expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by selective enforcement of a broad prohibiting statute." *Quoting Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965). *See also United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972).

Although the government argues in the instant case that it sought to prosecute first those young men who brought attention to themselves by confessing either to the government or in public their failure to register, defendant Schmucker's letter to the Selective Service — and apparently the "confessions" of the other defendants as well — contained more than the mere statement that "I have broken the law." The defendant has alleged and sought to present evidence to the District Court which suggests that the government prosecuted through its "passive enforcement" system only young men who made confessions through their criticisms of governmental policy.

The fact that criticisms of governmental policy may be accompanied by or construed as confessions does not make such criticisms any less an exercise of first amendment rights. As Justice Harlan warned in *Cohen v. California*, 403 U.S. 15, 26 (1971) (invalidating under first amendment a state prosecution for disturbing peace by wearing jacket bearing words "Fuck the Draft"), "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Similarly in the present case, the defendant claims — with some support in the record — that the government is forbidding criticisms of itself under the guise of prosecuting a form of confessional words.

Cohen is analogous to the instant case. There the prosecutors argued that the slogan was obscene and contained "fighting" words and therefore was not entitled to protection. The accused argued that the slogan had a political meaning, that he used the obscenity to dramatize that meaning. The court held that the two characterizations merged and that the context of the prosecution suggested a strong inference that the state brought the case in part because of the political meaning of the slogan. This case lends itself to similar analysis. The prosecution argues "confession," and the accused argues political and religious "protest."

The government contends that we should follow the decision in *United States v. Wayte*, 710 F.2d 1385 (9th Cir. 1983), which held that a young man who publicly expressed his refusal to register had not been selectively prosecuted. The majority on the Ninth Circuit panel concluded that defendant Wayte, who presented evidence of selective prosecution similar to that presented by the defendant here, had "not shown that he was selected from the larger group because of his exercise of his constitutional rights." *Id.* at 1387. The *Wayte* court upheld as valid the government's explanations that its system was necessary because "(1) the identities of other violators were not known and (2) the violators who [publicly] expressed their refusal to register made clear their willful violation of the law." *Id.* at 1388.

The *Wayte* court's blanket rejection of the trial court's factual findings of selective prosecution does not impress us. We are persuaded by the contrary opinion in *United States v. Falk*, *supra*, and by Judge Schroeder's thoughtful dissent in *Wayte*. In *Falk*, the Seventh Circuit Court of Appeals *en banc* concluded that the defendant's presentation of evidence regarding his prosecution for failure to possess a registration card was sufficient to shift the burden to the government to prove non-discriminatory enforcement of the

law and that the defendant was entitled to be heard on his claim that the prosecution had been initiated to punish the defendant's and to chill others' exercise of First Amendment freedoms. The *Falk* court's review of the law governing prosecutorial discretion led that court to conclude that

> just as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government.

479 F.2d at 620.

Citing *Falk*, Judge Schroeder in her dissent in *Wayte* noted that "where a vocal dissenter appears to have been singled out for prosecution, the government must accept the burden of proving nondiscriminatory enforcement." 710 F.2d at 1390. Judge Schroeder also emphasized that the District Court in *Wayte* had not made any clearly erroneous findings of fact regarding the selective prosecution issue and that "the effect of the majority's opinion is to permit the government to prosecute a citizen because he has spoken out rather than because he has violated the law. The result weakens our indispensable but fragile freedom to express unpopular ideas." *Id.*

In accordance with the reasoning expressed in *Cohen v. California* and by the Seventh Circuit in *Falk* and by Judge Schroeder in *Wayte*, we conclude that defendant Schmucker is entitled to a full evidentiary hearing on his claim that the federal government selectively prosecuted him because of his opposition to registration based on his exercise of first amendment rights.

Accordingly, it is so ordered. We retain jurisdiction over the other issues raised on this appeal, pending the outcome of the evidentiary hearing.

MEMORANDUM

(2)

FILED

MAY 7 1984

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No. 83-1292

In the Supreme Court of the United States

OCTOBER TERM, 1983

DAVID ALAN WAYTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner was impermissibly selected for prosecution for violation of the Military Selective Service Act in retaliation for his exercise of First Amendment rights.

2. Whether the 30-day notice and comment requirement contained in 50 U.S.C. App. 463(b) applies to the presidential proclamation directing registration with Selective Service.

3. Whether one subject to Selective Service regulations has a right to judicial enforcement of the 60-day notice and comment period adopted by the Director of Selective Service for issuance of such regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1292

DAVID ALAN WAYTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A17) is reported at 710 F.2d 1385. The opinion of the district court (Pet. App. A18-A47) is reported at 549 F. Supp. 1376.

JURISDICTION

The judgment of the court of appeals was issued on July 19, 1983. A petition for rehearing was denied on November 4, 1983. On December 20, 1983 Justice Rehnquist granted an extension of time within which to file a petition for a writ of certiorari to February 2, 1984. The petition was filed on that date.

STATEMENT

On July 22, 1982 petitioner was indicted by a grand jury in the Central District of California for wilfully refusing to register with the Selective Service, in violation of 50 U.S.C. App. (& Supp. V) 453, 462(a). On November 15, 1982, the district court dismissed the indictment on the grounds (1) that petitioner had been selected for prosecution on an unconstitutional basis and (2) that the presidential proclamation triggering the obligation to register was not properly promulgated (Pet. App. A47). A divided panel of the court of appeals reversed (Pet. App. A14).

1. On July 2, 1980 President Carter, acting pursuant to the Military Selective Service Act (50 U.S.C. App. (Supp. V) 453), issued Proclamation No. 4771, 45 Fed. Reg. 45247 which directed all male citizens born in 1960 to register with the Selective Service System during the week of July 21, 1980. Petitioner, then a 20-year old college student subject to the registration requirement, did not do so. Instead, he wrote a series of letters to government officials, including the President, stating that he had not registered and did not intend to. When after six months the letters failed to evoke a response, he wrote a letter to the Director of Selective Service reminding him of his earlier correspondence and reproving him for his failure to initiate prosecution (E.R. 240, 847).[1]

[1] Petitioner's letter stated in part (E.R. 240):

> Last August I wrote to inform you of my intention not to register for the draft. Well, I did not register, and still plan never to do so, but thus far I have received no reply to my letter, much less any news about your much-threatened prosecutions.
>
> I must interpret your silence as meaning that you are too busy or disorganized to respond to letters or to keep track of us draft-age youth. So I will keep you posted of my whereabouts.

Selective Service received a number of other communications like petitioner's, which stated that the writers were required to register but had not done so, or that others known to the writer had not registered. In the meanwhile, Selective Service established what it termed a "passive compliance system" for enforcing the Act, under which initial enforcement efforts would be directed at those whose names had come to its attention (E.R. 331-332). On June 17, 1981, after verifying that these individuals had not registered, Selective Service sent a letter to each, reminding him of his obligation to do so, requesting that he comply by filling out and returning an enclosed registration card, and warning that failure to comply could result in prosecution. Although petitioner received a copy of the letter, he failed to respond (E.R. 335, 345-347).

On July 20, 1981, Selective Service transmitted to the Department of Justice the names and files of 1,4 nonregistrants, including petitioner, for possible prosecution. After verifying that each person was required to register, David J. Kline (the attorney in the Department's Criminal Division responsible for supervising enforcement of the Selective Service statute) referred the names to the Federal Bureau of Investigation for further investigation and to the United States Attorneys for the districts where the nonregistrants resided (Oct. 7, 1982 Tr. 42-44).

The Criminal Division adopted a policy of attempting to induce these nonregistrants to comply voluntarily with the law before it resorted to prosecution. To that end the United States Attorney wrote a let-

"E.R." refers to the Excerpt of Record in the court of appeals.

ter to respondent again urging him to register by returning a registration card and warning that, if he failed to register, he would be prosecuted (E.R. 243). Petitioner again failed to respond.

In December 1981 the Criminal Division instructed all United States Attorneys to suspend efforts to prosecute nonregistrants and to allow them a grace period until February 28, 1982, in which to register (Oct. 7, 1972 Tr. 46-48). Three months after the grace period ended the United States Attorneys were instructed to proceed with prosecution if nonregistrants persisted in refusing to comply with the law. Accordingly, after verifying that petitioner still had not registered, the United States Attorney for the Central District of California obtained an indictment against him.

2. Petitioner moved to dismiss the indictment on the ground of selective prosecution. He requested an evidentiary hearing on the motion, and sought to subpoena Presidential Counsellor Edwin Meese III, Secretary of Defense Casper Weinberger, Selective Service Director Thomas Turnage, and Assistant Attorney General D. Lowell Jensen. He also requested production of internal documents of the Selective Service System, the Department of Justice, the Presidential Military Manpower Task Force, and the White House Staff. To support his selective prosecution claim petitioner alleged that, out of an estimated half million men who had not registered for the draft, the government's prosecution policy targeted only men who had in some way registered dissent against draft registration (E.R. 2-26). To substantiate this, petitioner relied upon several statements made in memoranda from the Justice Department's Criminal Division to the Attorney General's Office. One of these explained that the enforcement policy then in effect was "de-

signed to ensure that (1) the refusal to register is willful and (2) only persons who are most adamant in their refusal to register will be prosecuted." Another observed that, because the selection scheme was based upon nonregistrants reporting themselves or third parties reporting them to Selective Service, "the first prosecutions are liable to consist of a large sample of persons who object on religious or moral grounds and persons who publicly refuse to register." [2]

After a hearing on the scope of discovery for the selective prosecution claim, the district court directed the government not only to furnish petitioner copies of Selective Service and Justice Department documents concerning the prosecution of nonregistrants, but also to disclose Presidential Military Manpower Task Force, White House Staff, and Department of Defense documents related to the Selective Service program (Oct. 1, 1982 Tr. 23-25). The government gave petitioner all relevant Department of Justice memoranda, but it sought reconsideration of the order insofar as it required disclosure of documents in the custody of the Department of Defense and the White House Staff (E.R. 607).

The government relied in part upon the affidavits of Selective Service Director Turnage, Assistant Attorney General Jensen, and Criminal Division Attorney Kline. Turnage's affidavit stated that "[t]he identification and processing of possible violators of the Military Selective Service Act for referral to the

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[2] See, *e.g.*, E.R. 16-17; E.R. 95-96 (Memorandum from the Assistant Attorney General, Criminal Division to the Special Assistant to the Attorney General (June 30, 1982)); E.R. 98-100 (Memorandum from the Assistant Attorney General, Criminal Division to the Attorney General (June 29, 1982)).

Department of Justice [had been] the responsibility of [his] staff," and that he had no knowledge of the activities of the staff attorney responsible for that function (E.R. 586). Jensen's affidavit stated that, as Assistant Attorney General for the Criminal Division, he was responsible for creating policy for the prosecution of persons required to register with Selective Service, and that "[d]ecisions concerning such prosecution policy and its implementation have been made in the Criminal Division" (E.R. 592). Kline's affidavit stated that he was the proponent of Criminal Division policies relating to the prosecution of nonregistrants, and that once the decision to prosecute nonregistrants became final he had made all decisions about which files to refer for investigation and possible prosecution (E.R. 588-590).

Despite these sworn assertions that all prosecution decisions concerning nonregistrants had originated within the Criminal Division of the Department of Justice, the district court denied the government's motion for reconsideration and required it to submit for in camera inspection documents generated by the Department of Defense, the White House Staff, and the Presidential Military Manpower Task Force that related to draft registration (Oct. 5, 1982 Tr. 40).

At an evidentiary hearing on October 7, 1982, Kline testified at length about the formulation of prosecution policy within the Department of Justice.[5] Kline explained that, from its inception, the policy's

[5] At the October 7 hearing the government introduced copies of every document generated within the Department that was pertinent to the development of the policy. These included internal memoranda, policy letters sent to United States Attorneys, and drafts of such documents that were ultimately rejected or modified within the Criminal Division (see E.R. 1287-1291).

overriding objective was to foster compliance with the registration law by attempting to persuade known violators to register. He emphasized that the Division's approach involved "absolutely no intention to single out vocal non-registrants in order to deter them from exercising their First Amendment rights," and that "[t]he idea was to avoid the problems, not to engage in any kind of selective prosecution" (Oct. 7, 1982 Tr. 32-40, 49, 91). He also testified that, although he believed the Department's prosecution policy to be constitutionally sound, he had sought adoption of a more comprehensive scheme for identifying nonregistrants and selecting them for prosecution in order to enhance overall compliance with the registration law and to avoid selective prosecution claims. He pointed out that approval had been obtained in March 1982 to initiate a system of identifying nonregistrants through Social Security numbers, but that such a program could not be implemented until late 1982 or early 1983. (*Id.* at 58-60, 63-71.)[6]

[6] On December 1, 1981 Congress enacted legislation authorizing the President to require the Department of Health and Human Services to furnish social security data to the Director of Selective Service to assist in the enforcement of the registration law. See 50 U.S.C. App. (Supp. V) 462(e). Six additional months elapsed before the two agencies worked out the necessary implementing details (E.R. 538, 544, 546).

Although arrangements were made with the Department of Health and Human Services for use of social security data by June 1982, it turned out that current addresses of nonregistrants could be obtained only from the Internal Revenue Service. The IRS declined to divulge that information, believing that disclosure would violate 26 U.S.C. 6103. IRS has, however, sent notices from Selective Service to identified nonregistrants advising them that they should register or face possible prosecution.

Once it became clear that "active" enforcement of the registration law could not depend on the use of social security data,

On October 13, the government submitted for in camera inspection all the documents that the district court had ordered produced. A formal declaration of privilege executed by the White House Chief of Staff accompanied portions of the White House Staff and Military Manpower Task Force materials that had not previously been made public (E.R. 663).[5] Two days later the district court, finding that Presidential Counsellor Meese had played a prominent role in the deliberations of the Military Manpower Task Force

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Selective Service began negotiations with state departments of motor vehicles for the names and addresses of eligible men in driver license files. The first referrals of nonregistrants by Selective Service to the Department of Justice arising from that system occurred in February 1983. To date more than 100,000 names have been referred to the Department of Justice under that system. The Department has randomly selected 244 for investigation and prosecution. To date there have been no prosecutions, however, because each time a nonregistrant is given (as petitioner was) the choice of registering or being prosecuted, he has chosen to register.

[5] Portions of the materials that had no bearing on the Selective Service program were redacted by the government in compliance with instructions by the district court to "cull out" extraneous material (Oct. 1, 1982 Tr. 25). When the material was submitted to the district court, however, it compared the excisions made in compliance with its order to the gaps in the Watergate tapes and directed the government to explain the redactions. In response, the government filed a memorandum to which were appended declarations detailing the redaction process and showing that the deleted material was irrelevant under the court's order (Oct. 15, 1982 Tr. 9, 36; E.R. 759-764). Nonetheless, on October 20, the court directed the government to furnish it complete, unexpurgated versions of almost all the White House Staff and Military Manpower Task Force documents which the government had previously supplied (Oct. 20, 1982 Tr. 15). The government complied with the order on October 27.

concerning the "development of [Selective Service] policy," directed that he as well as Turnage and Jensen be made available to testify (Oct. 15, 1982 Tr. 37-40).

On October 29 the court directed the government to furnish petitioner certain White House and Military Manpower Task Force documents to which its claim of privilege applied, and granted petitioner's request for the production of Meese as a witness (Oct. 28, 1982 Tr. 4-5). The following day the court issued an order summarizing its reasons for ordering production[6] and giving the government until November 4 to determine whether to appeal the production order (E.R. 1179).

3. On November 5, the government notified the court that it could not comply with the discovery order in view of the important governmental interests at stake in maintaining the confidentiality of the privileged material. It suggested that the proper course was for the court to resolve the impasse by dismissing the indictment so that an appeal could be taken (E.R. 1181-1183). On November 15 the court dismissed the indictment on two grounds: that petitioner had proven a prima facie case of selective prosecution which the government had failed to rebut; and that Proclamation No. 4771, which triggered the registration requirement, was not properly promulgated.

Regarding the selective prosecution question the court observed that, although over 500,000 men had failed to register, under the government's passive enforcement scheme only "vocal nonregistrants" were

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[6] The district court's reasons for requiring production are reflected in its subsequent order dismissing the indictment.

prosecuted (Pet. App. A21). Characterizing nonregistrants who had reported themselves to the government or who had been reported by third parties as "vocal opponents of draft registration," the court found the selection scheme constitutionally infirm because "persons prosecuted for failing to register have consisted *solely*, not largely, of vocal nonregistrants" (*id.* at A26). Accordingly, it concluded that "[t]he inference is manifest that [petitioner] has been singled out for prosecution because he exercised his first amendment right to free speech" (*ibid.*).

The court also held that Proclamation No. 4771, issued to trigger the registration requirement of the Military Selective Service Act and to establish the time periods within which to register, was improperly promulgated because it did not comply with the notice requirement set forth in 50 U.S.C. App. 463(b). Although the statute specified a 30-day notice requirement before Selective Service regulations could become effective, under the Proclamation registrations were to begin on July 21, 1980—three weeks after its July 2 publication date (Pet. App. A42-A47).

The court rejected petitioner's argument that the registration regulations issued by Selective Service (32 C.F.R. 1615 *et seq.*) were invalid because they did not meet the 60-day notice and comment requirement for agency regulations announced in Executive Order No. 12044 and adopted by Selective Service. It reasoned that, because the Executive Order lacked a statutory basis, its enforcement was subject to the discretion of the President (Pet. App. A35-A42).

4. The court of appeals reversed. It observed that the government had indicted only 12 men, each of

whom was a vocal nonregistrant (Pet. App. A9). The court nevertheless held that, because petitioner had made no showing that the government's motive in prosecuting him was based upon activities protected by the First Amendment, "the district court's finding of selective prosecution was clearly erroneous" (Pet. App. A11). The court stated that a system of singling out reported violators when the identities of other violators were not known was "logical and does not evidence impermissible motives" (*ibid.*). It also stated that in making prosecutorial decisions, it was perfectly proper for the government to " 'consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in the illegal activity' " (*ibid.*) (citation omitted).

Concerning the district court's holding that Proclamation No. 4771 was void for noncompliance with the notice requirement in 50 U.S.C. App. 463(b), the court found that the requirement applies only to Selective Service regulations, not presidential proclamations (*id.* at A12). Finally, with regard to petitioner's claim that the Selective Service regulations implementing the registration requirement were invalid because they were not issued in compliance with a self-imposed 60-day notice and comment requirement,[7] the court held that the requirement was

[7] Petitioner argued in the district court that Selective Service's 60-day notice and comment requirement was issued in compliance with the Executive Order to the same effect (see Pet. App. A35). After the district court held that the Executive Order itself lacked a statutory basis and was therefore unenforceable, petitioner changed his argument in the court of appeals and maintained that the notice regulation was issued pursuant to the Selective Service Director's general statutory authority to issue regulations governing the Selective Service rather than pursuant to the Executive Order.

issued by the Director of Selective Service to conform to a judicially unenforceable executive order, and that it therefore was likewise not amenable to judicial enforcement (*id.* at A13-A14).

Judge Schroeder dissented. In her view the government's prosecution policy was impermissibly selective because it deliberately chose only men who wrote the government to report their failure to register for the draft or who had been reported by third parties. This enforcement policy was, she said, "directed toward persons whom the government viewed as 'vocal' non-registrants as opposed to 'quiet' non-registrants * * * [and] thus was designed to punish only those who had communicated their violation of the law to others" (Pet. App. A15).

DISCUSSION

This case presents an issue concerning the exercise of prosecutorial discretion in the enforcement of the Selective Service laws that has divided the courts of appeals: whether it is permissible for the government to focus investigation and prosecution on those who have admitted their failure to comply with the draft registration law. This issue is of little continuing importance so far as the enforcement of the Selective Service laws is concerned, since the government has now implemented its policy of actively seeking out persistent nonregistrants for prosecution, and abandoned the initial phase under which prosecution targets were identified on the basis of information in Selective Service's own records establishing nonregistration. See note 4, *supra*. Nevertheless, because, in addition to a division in the circuits on the question of selective prosecution in the draft registration context, the issue has broader implications for the law governing prosecutorial discretion, we do

not oppose granting the petition.* The other questions presented by petitioner, however, do not warrant further review.

1.a. The court of appeals held that the government could properly select for prosecution those nonregistrants whose failure to register has been communicated to the government by them or others (Pet. App. A10-A11). It reasoned that the government's prosecution policy impaired no First Amendment rights because petitioner had made no showing that selection was motivated by a desire to punish or discourage protected First Amendment conduct, or that

* We normally oppose petitions seeking review of interlocutory pretrial decisions, in order to avoid unnecessary delay of the trial process and to avoid addressing specific issues that may be mooted by an acquittal. Here, however, we believe that the policies that ordinarily militate against interlocutory review in criminal cases apply with diminished force and may be outweighed in the special circumstances of this case. The same issue has arisen in a number of other nonregistration cases now awaiting trial or disposition on appeal. See, *e.g.*, *United States* v. *Martin and Eklund*, Nos. 82-2425, 82-2505 (8th Cir.) (en banc) (pending resolution of selective prosecution issue); *United States* v. *Sasway*, No. 82-1585 (9th Cir. Feb. 2, 1984) (holding on the basis of *Wayte* that no impermissible selective prosecution occurred); *United States* v. *Epp*, No. 82-10077-01 (D. Kan.) (hearing pending on issue of impermissible selective prosecution); *United States* v. *Schlossberg*, Cr. No. 3-83-90 (D. Minn.) (same); *United States* v. *Kerley*, No. 82-CR-47-D (D. Wis.) (same); *United States* v. *Rutt*, Cr. No. 83-60033 (E.D. Mich.) (same). It is inevitable that the Court will be asked to resolve the conflict in one of these cases if it does not do so here, and, assuming the issue presented is deemed worthy of review by this Court, it seems preferable that review be undertaken promptly. We note in this connection that the delay attendant upon review in this Court is unlikely to inhibit any eventual trial, since the evidence on the merits is documentary, and since petitioner in any event has admitted his failure to register.

the government had focused its investigation on him because he had engaged in protest activities.

In *United States* v. *Schmucker*, 721 F.2d 1046 (1983), the Sixth Circuit reached a contrary conclusion.[9] It noted that out of approximately half a million possible defendants, only those who had opposed registration "by letter to the government or public speech" had been prosecuted, and that several Justice Department officials had anticipated such a result (Pet. App. A51). The court concluded (*id.* at A51-A52):

> A prosecutorial policy so limited clearly violates the first amendment. It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strength of their convictions. It excludes, and therefore rewards, thousands who engage in covert noncompliance and evasion of the law * * *. It discourages dissenters from expressing their criticisms of government policy.

The Sixth Circuit expressly rejected the Ninth Circuit's contrary holding, and stated that it was persuaded by Judge Schroeder's dissent. It therefore remanded the case to the district court for an evidentiary hearing on the merits of the selective prosecution claim. (*Id.* at A55-A56.)[10]

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[9] The decision of the court of appeals in *Schmucker* is reproduced at Pet. App. A48-A56. On March 12, 1984, the court denied the government's petition for rehearing, Judge Wellford dissenting.

The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Schmucker*, and the government will accordingly be filing a petition in that case.

[10] We note that the two cases were decided at somewhat different procedural stages. Here the court of appeals held that the defendant had failed, after an evidentiary hearing,

b. The legal principles governing petitioner's selective prosecution claim are well established. The government has broad discretion in determining whom to prosecute and what charges to bring.[11] As the District of Columbia Circuit observed in *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.), "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings * * *." This broad rule of judicial deference is designed to ensure prosecutorial independence and flexibility and reflects "the manifold imponderables which enter into the prosecu-

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to make a showing of improper selective prosecution (Pet. App. A11, A27). In *Schmucker* the court merely held that the defendant was entitled to the type of evidentiary hearing petitioner got (Pet. App. A56). In arriving at that result, however, the Sixth Circuit held that the government's policy would be unconstitutional if it resulted in the prosecution only of individuals who criticized government policy while confessing their failure to register (*id.* at A52). That conclusion essentially forecloses the possibility that the district court will rule for the government after an evidentiary hearing. Nearly all of those indicted to date have brought themselves to the attention of Selective Service (*id.* at A30 n.9), and their reasons for doing so have obviously been opposition to the draft, rather than a sense of contrition or a desire to make prosecution easier. The differing procedural postures are therefore of no particular consequence for purposes of determining whether to grant the petition in this case.

[11] See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *United States* v. *Hoover*, 727 F.2d 387, 389 (5th Cir. 1984). See also *United States* v. *Goodwin*, 457 U.S. 368, 380 (1982); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

tor's decision to prosecute." *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973). Those include the government's inability to investigate and prosecute every suspected violation of the law, *United States* v. *Ojala*, 544 F.2d 940, 945 (8th Cir. 1976), and the opportunity to obtain convictions in some cases because evidence of guilt is available with little or no investigation. See, *e.g.*, *United States* v. *Taylor*, 693 F.2d 919, 923 (9th Cir. 1982), petition for cert. pending, No. 83-6035.

The government's discretion in selecting targets for prosecution is not completely unfettered. Selection cannot be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." [12] In order to establish a claim of impermissible selective prosecution, the defendant thus bears the burden of demonstrating both that he was singled out while similarly situated offenders were not, and that the selection was based upon some invidious purpose, such as retaliation for the exercise of First Amendment rights.[13]

Petitioner has failed to establish either of these elements. Although he claims that the government failed to prosecute over 500,000 nonregistrants, he made no showing that the government failed to prose-

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[12] *Bordenkircher*, 434 U.S. at 364, quoting *Oyler* v. *Boles*, 368 U.S. at 456. See also *United States* v. *Hazel*, 696 F.2d 473, 474 (6th Cir. 1983); *United States* v. *McCord*, 695 F.2d 823, 826 (5th Cir.), cert. denied, No. 82-6357 (Apr. 4, 1983); *United States* v. *Taylor*, 693 F.2d at 923.

[13] *United States* v. *Wilson*, 639 F.2d 500, 505 (9th Cir. 1981); *United States* v. *Hazel*, 696 F.2d at 474; *United States* v. *Taylor*, 693 F.2d at 923; *United States* v. *Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

cute other *known* nonregistrants. See *United States* v. *Martin*, 557 F. Supp. 681, 687 (N.D. Iowa 1982), appeal pending, No. 82-2425 (8th Cir.) (en banc).[14]

Moreover, as the court of appeals observed (Pet. App. A11), petitioner failed to produce any evidence that he was singled out for prosecution because of activities protected by the First Amendment, or that the government's prosecution policy in general was designed to retaliate against those who voiced disagreement with the registration law. Instead, the evidence showed that there was no intention to deter or punish First Amendment activities (Oct. 7, 1982 Tr. 38, 45), and that with the exception of state-

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[14] We thus do not agree with the court of appeals that petitioner satisfied the first element of the test for impermissible selective prosecution merely by asserting that the government did not prosecute most of the members of the large class of eligible men who failed to register. The first element requires proof that other *similarly situated* offenders have not been prosecuted—*i.e.*, in this context, nonregistrants whose identities are known to the government. See *Oyler* v. *Boles*, 368 U.S. at 456 (allegations of selective prosecution insufficient: no evidence that prosecutor knew criminal records of other multiple offenders); *United States* v. *Kahl*, 583 F.2d 1351, 1353 (5th Cir. 1978) (defendant failed to show that the government did not prosecute persons it knew violated the law); *United States* v. *Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972) (prima facie test met where defendant showed that government could readily learn identity of other offenders); see also *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983) (discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances). Here, as the court below acknowledged (Pet. App. A11), the government investigated all nonregistrants whose names came to its attention, pursuing the same policy with respect to each without regard to the extent to which the nonregistrant may have publicly criticized the draft registration law.

ments petitioner made in letters to government officials, Selective Service had no knowledge, at the time his name was referred to the Department of Justice, of his anti-registration activities (E.R. 338-339). There is, moreover, absolutely no evidence that the government sought to identify and prosecute vocal opponents of registration whose noncompliance with the law was not shown in Selective Service's records.

Nor is it of consequence that the government's selection policy had the incidental effect of identifying opponents of registration, an eventuality anticipated in Department of Justice correspondence.[18] The proper test for determining whether prosecutorial selection is impermissible is whether its purpose is to retaliate against persons for the exercise of constitutional rights. See, *e.g.*, *United States* v. *Wilson*, 639 F.2d 500, 505 (9th Cir. 1981). The evidence here

[18] Petitioner refers to those selected for prosecution as "vocal" opponents of registration (Pet. 9). The term "vocal" is misleading, however, if it is meant to suggest that all of those indicted had made *public* statements of opposition to the draft. In some cases the only statement made by the defendant prior to indictment was a letter to the government declaring his refusal to register. The district court in *Schmucker*, for example, found that "neither defendant Mark Schmucker, nor, previously convicted Enten Eller, publicly called attention to their non-registration prior to their indictments." *United States* v. *Schmucker*, No. 82-133-A (N.D. Ohio Oct. 4, 1982), slip op. 3. It goes without saying that the government has little interest in discouraging statements of noncompliance with the law made solely to the government agency responsible for enforcing it. And the inclusion of such individuals along with others who (whether known or unknown to the government) may have made public statements against the draft makes clear that the selection criterion was the possession by Selective Service of evidence of guilt, not the exercise of First Amendment rights.

showed that, like the defendants in other prosecutions for violation of the draft registration laws, petitioner was selected only "because he purposely identified himself to the Selective Service System as a non-registrant and has persisted in refusing to register by rejecting repeated opportunities [to do so]." *United States* v. *Eklund*, 551 F. Supp. 964, 968 (S.D. Iowa 1982), appeal pending, No. 82-2505 (8th Cir.) (en banc).

Finally, even if one assumes that potential defendants were chosen because they sought to draw public attention (rather than merely the government's attention) to their failure to register—an assumption contrary to the evidence—such a policy would still not violate the Due Process Clause. The courts have repeatedly held that, absent a retaliatory purpose, the prosecution of protesters of a government policy "who publicly and with attendant publicity assert an alleged personal privilege [to violate the law] is not selection on an impermissible basis." In order to maximize the deterrent potential of criminal prosecution, the government may single out for prosecution those who will receive, or are likely to receive, the attention of the media.[19]

2. Petitioner's remaining claims concerning irregularities in the promulgation of the presidential proclamation triggering the obligation to register, and of the implementing Selective Service regulations, were properly rejected by the court of appeals. Because

[19] *United States* v. *Catlett*, 584 F.2d at 867; *United States* v. *Greene*, 697 F.2d 1229, 1236 (5th Cir. 1983); see also *United States* v. *Taylor*, 693 F.2d at 923; *United States* v. *Amon*, 669 F.2d 1351, 1356-1357 (10th Cir. 1981); *United States* v. *Wilson*, 639 F.2d at 504-505; *United States* v. *Ojala*, 544 F.2d at 944.

these claims were correctly decided, and do not present questions upon which the courts of appeals are in conflict, they do not warrant further review.

Petitioner claims (Pet. 12-14) that Proclamation No. 4771 (45 Fed. Reg. 45247 (1980)), which effectuated the registration requirement, was improperly promulgated because it became effective on July 21, 1981, prior to expiration of the 30-day notice period set forth in 50 U.S.C. App. 463(b). That section, added by a 1951 amendment to the Military Selective Service Act, provides that

> no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation.

As the court of appeals observed (Pet. App. A12), the section by its express terms makes only Selective Service regulations subject to the 30-day notice requirement; it does not refer to presidential proclamations. Accord, *United States* v. *Martin*, 557 F. Supp. at 689. That Congress did not intend the term "regulations" in Section 463(b) to embrace presidential proclamations is clear from other provisions of the Act and the legislative history of Section 463. Section 453 requires draft-eligible males to register "in such manner, as shall be determined *by proclamation of the President and by rules and regulations prescribed hereunder*" (emphasis added), and Section 462(f)(1), a 1982 amendment to the Act, denies a

student loan to any person who fails to register "in accordance with any proclamation * * * or in accordance with any rule or regulation." Pub. L. No. 97-252, § 1113(a), 96 Stat. 748. Although Congress included both proclamations and Selective Service regulations in these sections, it omitted the term "proclamations" in the notice provision of Section 463(b) enacted in the interim. That action indicates that Congress knew the difference between proclamations and regulations, and creates a strong presumption that the omission in Section 463(b) was intentional. *See Chertkof* v. *United States*, 676 F.2d 984, 988 (4th Cir. 1982), quoting 2A C. Sands, *Sutherland, Statutory Construction* § 51.02 (4th ed. 1973) ("[if] words used in a prior statute to express a certain meaning are omitted, it will be presumed that a change of meaning was intended").

That such an omission was intended is confirmed by the legislative history of Section 463(b). During the floor debates on the bill that was to add Section 463(b) Senator Kennedy, who sponsored the legislation, explained that "[w]hat this amendment proposes is that all regulations issued for the Selective Service System be published in the Federal Register 30 days before their effective date." 117 Cong. Rec. 20483 (1971). To make the purpose of the legislation even more plain, Senator Kennedy gave examples of the type of enactments toward which it was directed. Each involved a regulation that had been issued by Selective Service despite a prior judicial decision portending its illegality. *Id.* at 20485. Following this explanation Senator Stennis stated that, as he understood it, the "amendment is addressed * * * to regulations that the Director of Selective Service is authorized under th[e Selective Service] law to is-

sue" and "merely requires publication of those regulations 30 days in advance of their effective date." Senator Kennedy responded: "That is correct" (*id.* at 20486). Nothing in the debate suggests that Congress intended the notice provision to cover not only regulations, but also the presidential proclamation triggering implementation of the Selective Service Act.

The distinction drawn in Section 463(b) between Selective Service regulations and a presidential proclamation is understandable in light of the historic difference in functions performed by each. Since the enactment of the first draft law in 1917 the statutory mechanism for triggering registration has been a "proclamation by the President stating the time or times and place or places of * * * registration" (40 Stat. 955-956), as well as the age groups required to register. *See Toussie* v. *United States*, 397 U.S. 112, 117 (1970); Proclamation No. 2972, 17 Fed. Reg. 3473 (1952); Proclamation No. 2942, 16 Fed. Reg. 8969 (1951); Proclamation No. 2799, 13 Fed. Reg. 4173 (1948). By contrast, Selective Service regulations establish procedures for effecting registration "whenever the President by proclamation * * * fixes a day or days for registration." 32 C.F.R. Pt. 1615 *et seq.* They also establish procedures for classification once registration has been completed (32 C.F.R. Pt. 1630), for appealing classifications (32 C.F.R. Pt. 1651); for determining what classes of persons are to be selected for induction (32 C.F.R. Pt. 1631), and for ordering a person to report for induction (32 C.F.R. Pt. 1624). It should be evident that a presidential determination that registration should take place, and that a pool is needed by a certain date for possible service in the armed forces, is not the kind

of administrative action for which notice and comment procedures would be useful.[17]

In any event, it is not apparent why petitioner's complaint about the effective date of Proclamation No. 4771 should entitle him to avoid prosecution for nonregistration. Although the proclamation directed him to register during the week of July 21, 1980, he was not indicted until two years later.[18] If the proclamation was in fact subject to the 30-day requirement of Section 463(b), the failure to permit the full 30-day period to elapse would simply have delayed its effective date until August 1, 1980, when the period expired. *See Rowell* v. *Andrus*, 631 F.2d 699, 704 (10th Cir. 1980); *United States* v. *Gavrilovic*, 551 F.2d 1099, 1106 (8th Cir. 1977).[19] And once the ob-

---

[17] In promulgating Proclamation No. 4771, for example, President Carter stated that he was prompted to do so by the Soviet invasion of Afghanistan, and that registration was necessary to expedite the marshalling of our national defense mechanism. 16 Weekly Comp. Pres. Doc. 1274 (July 2, 1980).

We note that Section 463(b) requires comments concerning the proposed regulations covered by that Section to be submitted to the Director of Selective Service. It is highly unlikely that Congress envisioned the Director acting in any effective way upon comments submitted in response to proclamations like President Carter's.

[18] Petitioner was, however, aware during the week of July 21, 1980 of his obligation to register then. The record shows that on July 20, 1980, he stated in a newspaper interview that he would not register. And on August 4, 1980, he wrote letters to the President and to Selective Service informing them that he knew of the proclamation and had violated it (E.R. 842, 845, 846).

[19] *Rowell* and *Gavrilovic* dealt with the 30 day notice requirement for final rulemaking imposed by the Administrative Procedure Act, 5 U.S.C. 553(d). 50 U.S.C. App. 463(b) is

ligation to register attached, petitioner was under a continuing obligation to register until he reached the age of 26. 50 U.S.C. App. 462(d); *United States* v. *Robinson*, 485 F.2d 1157, 1163 (3d Cir. 1973); E.R. 1 (petitioner was charged with willfully failing to register during the period beginning July 27, 1980 and continuing to at least May 28, 1982).

3. There is also no merit to petitioner's contention (Pet. 14-19) that Selective Service regulations issued to implement the Military Selective Service Act are invalid because they did not provide for an adequate notice period prior to their effective date.

On March 23, 1978, President Carter issued Executive Order No. 12044, entitled "Improving Government Regulations." 43 Fed. Reg. 12661 (1978). Its express purpose was "to adopt procedures to improve existing and future regulations." To that end the President, acting voluntarily and not on the basis of any statutory requirement, prescribed a 60-day notice and comment period for agency regulations (*id.* at 12662). However, the order contained the following qualification:

> This Order is intended to improve the quality of Executive Agency regulatory practices. It is not intended to create delay in the process or provide new grounds for judicial review.

Id. at 12663-12665. An accompanying "Summary and Analysis of Public Comments" explained that the "final order relies on strengthened OMB enforce-

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comparable to that section, and not to 5 U.S.C. 553(b) (notice of proposed rulemaking), since like final rules, Selective Service regulations become effective once the requisite time has elapsed without the need for republication, and without regard to whether dissenting views are submitted or a hearing held.

ment rather than judicial review. Again, the order is not intended to create more delays by increasing litigation" (*id.* at 12670).

On November 1, 1978, the Acting Director of Selective Service published a report (the "Shuck Report") which stated that "[i]n accord with Executive Order 12044, at least 60 days will be allowed for comment on proposed regulations in the future." 43 Fed. Reg. 50981 (1978).[20] The Acting Director later promulgated the regulations at issue here, prescribing registration procedures that required registrants to complete a registration card and to furnish evidence of identity upon reporting to the place of registration. See 32 C.F.R. 1615.4. The regulations became effective after a 32-day notice period, a delay that satisfied the 30-day statutory requirement of Section 463(b) but fell short of the 60-day period described in the 1978 report implementing Executive Order No. 12044. In the courts below petitioner argued that failure to afford an additional 28 days' notice voided the entire registration scheme and therefore precluded his prosecution for failure to register. Both courts held that because Executive Order No. 12044 was not judicially enforceable, the Shuck Report issued pursuant to that order was, likewise, not judicially enforceable (Pet. App. A13, A42).

It may be, as petitioner argues (Pet. 15-16), that if the Acting Director had promulgated a legislative-type rule pursuant to 50 U.S.C. App. 460(b)(1) and 460(c) to govern notice and comment procedures, it would have had the force and effect of law. But see *American Farm Lines* v. *Black Ball Freight Service*,

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[20] The proposal adopted in the Shuck Report was first made on April 11, 1978, less than three weeks after issuance of Executive Order No. 12044 (Pet. App. A13).

397 U.S. 532, 537-539 (1970). Petitioner draws from this the conclusion that the Shuck Report is a legislative-type rule. But it obviously is not; it is instead a mere statement of policy, like Executive Order 12044, not grounded in statute. In determining whether a regulation is judicially enforceable, one must begin by looking at the source of authority relied on by the agency in promulgating the regulation. See, *e.g.*, *Humana of Virginia, Inc.* v. *Blue Cross*, 622 F.2d 76, 78 (4th Cir. 1980). If the Shuck Report had said that it was not intended to implement Section 460(b)(1) and (c), and had explicitly stated—as the Order did—that it was "not intended to • • • provide new grounds for judicial review" (43 Fed. Reg. 12664-12665 (1978)), petitioner would not be entitled to object that it had not been followed when 34 C.F.R. 1615.4 was promulgated. Instead the Report stated that it was issued "[i]n accord with Executive Order 12044." 43 Fed. Reg. 50981 (1978). The difference is not significant. Like the Executive Order it is designed to implement, the Shuck Report simply announced an attempt to improve agency procedures without conferring on participants the right to complain if its implementation fell short of perfection.

In any event, as we pointed out above (pages 23-24) in discussing the effective date of Proclamation No. 4771, petitioner's claim that the regulations should not have become effective for an additional 28 days does not entitle him two years later to avoid prosecution for nonregistration. If the regulations were not valid when issued, they became so four weeks later.

CONCLUSION

We do not oppose grant of the petition for a writ of certiorari, limited to the first question presented. As to the other questions, the petition should be denied.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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CLERK

No. 83-1292

In the Supreme Court of the United States

OCTOBER TERM, 1983

DAVID ALAN WAYTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is filed to draw to the Court's attention the en banc decision of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Eklund*, No. 82-2505 (May 4, 1984). In that case Eklund was convicted of failure to register with Selective Service, in violation of 50 U.S.C. App. (& Supp. V) 453, 462(a), and argued on appeal that he had been the victim of impermissible selective prosecution because he had been a "vocal opponent[] of the registration program" (slip op. 3). The en banc court of appeals concluded that Eklund had not raised a reasonable doubt concerning the government's purpose in prosecuting him and was not entitled to a hearing on his claim of selective prosecution because "First Amendment values were not threatened, implicated, or involved in his prosecution" (slip op. 15).

Eklund also argued on appeal that Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (1980), was void because it had not been promulgated in compliance with 50 U.S.C. App. 463(b). The court of appeals rejected this argument, concluding that Congress's " 'reference to regulations alone [in Section 463(b)] indicates that proclamations do not fall within the notice and comment requirement' " (slip op. 32, quoting *United States* v. *Wayte*, 710 F.2d 1385, 1388-1389 (9th Cir. 1983)).

Finally, Eklund contended that the Selective Service regulations issued to implement the Military Selective Service Act are invalid because they were not promulgated in compliance with the 60-day notice and comment period for proposed regulations imposed by the Director of Selective Service, 43 Fed. Reg. 50981 (1978). The court of appeals held (slip op. 32):

> We agree with the court in *United States* v. *Wayte*, *supra*, 710 F.2d at 1389, that the 60-day notice and comment period requirement was imposed in accordance with Executive Order 12044, 43 Fed. Reg. 12,661, 12,663 (1978), which is judicially unenforceable.

Chief Judge Lay, and Judges Heaney, McMillian, and Arnold dissented. They would have held that 50 U.S.C. App. 453(a) and 462(d) did not impose a continuing duty to register for the draft (slip op. 33-39) (opinion of Lay, C.J.), and that Eklund was entitled to a hearing on the issue of selective prosecution (slip op. 39-44) (opinion of Heaney, J.).

We have lodged copies of the Eighth Circuit's decision, which we received after filing our Brief, for the convenience of the Court.

As previously stated, we do not oppose granting the petition for a writ of certiorari, limited to the first question presented. As to the other questions, the petition should be denied.

Respectfully submitted.

REX E. LEE
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MAY 1984

JOINT

APPENDIX

No. 83-1292

FILED

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ALEXANDER L. STEVAS
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In The

Supreme Court of the United States

October Term, 1983

DAVID ALAN WAYTE,

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vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR CERTIORARI FILED
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Vol. I of III

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No. 83-1293

In The

Supreme Court of the United States

October Term, 1983

DAVID ALAN WAYTE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

United States District Court for

the Central District of California

Docket No. CR 82-630

Date	Filings and Proceedings
7/27/82	INDICTMENT filed
9/7/82	MOTION by Defdt. to dismiss and for evidentiary hearing re passive enforcement system
9/27/82	ORDER granting evidentiary hearing
10/7/82	EVIDENTIARY HEARING
10/29/82	ORDER re prima facie finding of selective prosecution

11/15/82	ORDER and OPINION dismissing indictment NOTICE OF APPEAL to U.S.C.A., 9th Cir., filed by defdt.

United States Court of Appeals

For The Ninth Circuit

5/2/83	Argued and Submitted before Wright, Schroeder, Cjj and Coughenour, Dj
7/19/83	ORDER reversing district court judgment
11/4/83	ORDER denying petition for re-hearing and suggestion for en banc hearing

I.

INDICTMENT

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1982 Grand Jury

UNITED STATES OF AMERICA,	CR 82- 433
Plaintiff,	INDICTMENT
v.	(50 U.S.C. App. §§453, 462(a): Failure to Register with Selective Service System)
DAVID ALAN WAYTE,	
Defendant.	

The Grand Jury charges:

(50 U.S.C. App. §§453, 462(a)

Beginning on or about July 27, 1980 and continuing to at least on or about May 28, 1982, within the Central District of California, defendant DAVID ALAN WAYTE, a male person required to present himself for and submit to registration pursuant to the Military Sel-ctive Service Act, rules and regulations duly made pursuant thereto and Presidential Proclamation 4771 of July 2, 1980, did knowingly and willfully fail, evade and refuse to present himself for and submit

to registration, in violation of Title 50, United States Code, Appendix, Sections 453 and 462(a).

A TRUE BILL

Foreperson

STEPHEN S. TROTT
United States Attorney

SSS:ms
(ini.)

II.

ORDER ALLOWING CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 83-1292

David Alan Wayte,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed May 29, 1984.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to Question 1 presented by the parties.

III.

DISTRICT COURT ORDER AND OPINION

FILED

NOV 15 1982

Clerk, U.S. District Court
CENTRAL DISTRICT OF CALIFORNIA
By

Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

United States of America, Plaintiff, v. David Alan Wayte, Defendant.	CR 82-630 TJH ORDER AND OPINION

Background

Defendant David Alan Wayte was indicted on July 22, 1982 for failure to register for the draft under section three of the Military Selective Service Act ("Act"), as amended, 50 U.S.C. App. § 453. Wayte had previously written two letters to the President expressing

his opposition to draft registration and his intention not to register.

Defendant moves this court to dismiss the indictment on several bases. First, defendant urges this court to dismiss the indictment on the ground that the Government has refused to comply with this court's Order of October 29, 1982.[1]

Second, the court ordered Edwin Meese III, Counselor to the President, to appear as a witness in an evidentiary hearing on selective prosecution. Mr. Meese has refused to comply with the court's order. Therefore, defendant moves the court for dismissal of the indictment as the appropriate sanction for the Government's recalcitrance.

Third, defendant asserts that the Government has not rebutted the court's prima facie finding of discriminatory prosecution.

Finally, defendant seeks dismissal of the indictment on the basis that the Selective

Service System's draft registration regulations and Presidential Proclamation 4771 ("the Proclamation") were illegally promulgated and, therefore, invalid.

Each of defendant's asserted bases for dismissal of the indictment will be addressed.

I. Appeal Under 18 U.S.C. § 3731 In Relation To A Claim Of Executive Privilege.

As an initial matter, this court is compelled to question the Government's conduct with regard to its defiance of this court's Order of October 29, 1982. The Government contends that it is entitled to invoke the doctrine of executive privilege over both the documents this court has ordered it to make available to defendant and any subject matter that would be the basis of Mr. Meese's testimony.

This court offered to the Government the opportunity to seek the resolution of the impasse between it and the court by way

of certification of the Government's claim of executive privilege for appellate review by the Ninth Circuit. The court stated that it would stay this proceeding in an attempt to encourage the Government to seek an appeal.

The Government has refused to appeal the issue of executive privilege and instead has asserted that the court does not have the authority to provide the Government with an opportunity to appeal the court's Order. Rather, the Government argues, the only way to achieve appellate review of the Government's assertion of executive privilege is for the court to dismiss the indictment against defendant. This court disagrees with the Government's position.

In Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), the court addressed the issue of whether or not 28 U.S.C. § 1291 and 18 U.S.C. § 3731 allowed the district court to grant a former President an opportunity to

appeal in light of a potential claim of executive privilege. Id. at 721, n.100. The court decided that the "District Court's rulings on particularized claims [of privilege] would be appealable by the ... Special Prosecutor under 18 U.S.C. § 3731" (citations omitted).[2]

In light of Sirica, it appears well settled that the Government, in the present case, could have pursued an avenue of appeal which would have fallen far short of calling for the dismissal of the indictment. The fact that this is a criminal proceeding does not alter the situation.

II. Prima Facie Finding of Selective Prosecution

On September 30, 1982, this court conducted a hearing to determine whether the defendant was entitled to an evidentiary hearing on his claim of selective prosecution. To be granted an evidentiary hearing,

the defendant must allege enough facts to take the question beyond the frivolous stage. United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978).

The defendant has clearly met this standard. During the September 30, 1982 hearing, evidence was presented that hundreds of thousands of young men have failed to register for the draft. A conservative figure would be over 500,000 men. Further, it was established that the Government has a "passive" enforcement policy, which has resulted in the indictments and prosecutions of only vocal non-registrants. The definition of vocal as used by both the Government and the defendant includes non-registrants who were reported by third parties, as well as those who were self-reported. At the time of the hearing, eleven men, including the defendant, had been indicted for failure to register.[3] These facts both demonstrated

that the question was not frivolous and, further, helped to establish the prima facie case of selective prosecution.

Mere selectivity in prosecution, standing alone, creates no constitutional problem. Oyler v. Boles, 368 U.S. 448, 456 (1982). The courts have established a two-prong test for establishing a prima facie case. The defendant must show (1) that others similarly situated generally have not been prosecuted for conduct similar to that for which the defendant was prosecuted, and (2) that the Government's discriminatory selection of defendant for prosecution was based on impermissible grounds such as race, religion or exercise of the defendant's first amendment right of free speech. United States v. Scott, 521 F.2d 1188, 1195 (9th Cir.), cert. denied, 424 U.S. 955 (1975); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

Equal protection of the laws is not limited to enacting fair and impartial legislation, but necessarily extends to the application of these laws. United States v. Falk, 479 F.2d 616, 618 (7th Cir. 1973). This basic principle was recognized by the Supreme Court long ago in Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

In Yick Wo, the city of San Francisco made it illegal to maintain a laundry without permission of the board of supervisors unless the laundry was located in a brick or stone building. Although the law appeared fair on its face, the facts showed that principally Chinese laundry operators were denied permission to continue using wooden facilities. The Supreme Court held that criminal enforcement of the law was therefore illegal. As the Falk court pointed out,

> Yick Wo was concerned with an abuse of discretion in the administration

> of a public ordinance by a city licensing board, and not with the activities of law enforcement officials who presumably prosecuted all Chinese who violated the commands of the licensing board. The underlying principle has nevertheless been properly held to apply to the actions of prosecutors and police officials.

479 F.2d at 618 (emphasis added).

More recently, in United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), the defendant was convicted of violating 13 U.S.C. § 221(a) by refusing to answer questions on the Department of Commerce Census Form of 1970. Steele and six other unrelated people resided in a private house in Honolulu, Hawaii. He refused to answer the census questions because it might have disclosed a violation of the Honolulu Zoning Code.

Steele raised the selective prosecution defense at his trial. Only four persons in Hawaii had been prosecuted for violating § 221(a). All four had been vocal opponents of the census and had urged the public not to comply with census requirements. Id. at 1150-51.

Steele attempted to prove that there were others similarly situated who had not been prosecuted. The United States Attorney's office stated that this information was not available. However, Steele located six persons who had not completed the census form and had not been prosecuted. None of these people had taken a public stand against the census. Id. at 1151.

A census official testified that, to the best of his recollection, the four people prosecuted were the only ones who refused to cooperate. Steele's evidence regarding the other six showed that, at the very least,

the official's memory was faulty.

The Ninth Circuit reversed Steele's conviction based on selective prosecution. The census bureau had an information gathering system that should have compiled the names of all those who refused to cooperate. While the census official recollected only four people who refused to comply, the evidence suggested a minimum of ten. The court stated that this fact alone strongly suggested a questionable emphasis on census resisters. Id. at 1152.

The facts in Steele are similar to those in the instant case. Defendant has shown that the Government has the ability to locate more than one-tenth of one percent of at least 500,000 non-registrants. On July 9, 1982, a memorandum entitled "Prosecution of Selective Service Non-Registrants" was sent to United States Attorneys (Mid-sized Offices) from D. Lowell Jensen,

Assistant Attorney General, Criminal Division.[4]

In the memorandum, Mr. Jensen pointed out that the Selective Service System how has access to all Social Security records[5] and has "nearly implemented an 'active' enforcement policy," based on the use of those records to identify non-registrants. If an active system were implemented, the memorandum anticipated that Selective Service would refer massive numbers of non-registrants to the Justice Department. In that case, an appropriate selection system, probably based on "randomness," would be implemented. Random selection is a valid basis on which to justify prosecutions of non-registrants. Steele, 461 F.2d at 1152.

The court finds it hard to believe that the prosecutive arm of the Government, with access to Social Security records, could not locate any non-registrants other than those who were vocal in their opposition to

draft registration. In fact, the Government concedes that if and when an active enforcement program is implemented, it has the ability to select men to prosecute based on randomness.

General Thomas K. Turnage, director of the Selective Service System, also remarked on the Government's ability to identify non-vocal non-registrants. In a statement prepared for presentation on July 28, 1982 to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, General Turnage stated that "[i]n August, we start realizing the results of a more active compliance program with the ultimate goal of identification of all non-registrants. This program involves matching our Selective Service registrant files with files of the Social Security Administration."

Further, at the present time, when the active enforcement system has not yet been put in place, the court cannot accept the Government's disingenuous argument that it has prosecuted all known non-registrants. It strains credulity to believe that the investigative agencies of our Government, especially the Federal Bureau of Investigation, could not locate any non-vocal non-registrants.[6] The inference is strong that the Government could have located non-vocal non-registrants, but chose not to. For example, non-registrants could be located by using motor vehicle registration records in many states.

The defendant has also met the second prong of the prima facie test. In Steele, the court stated that "[a]n enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen

for prosecution are being punished for their expression of ideas, a constitutionally protected right." Id. at 1152. At the time of the September 30, 1982 hearing, all eleven men indicted under the Government's passive enforcement program were vocal opponents of draft registration.

Mr. Jensen's July 9, 1982 memorandum is again illuminating in this regard. He stated that the Justice Department's prosecutive policy is designed to insure that only persons who are most adamant in their refusal to register will be prosecuted. Under the passive enforcement program, non-registrants come to the attention of Selective Service by either reporting themselves or having others report them. Therefore, according to Mr. Jensen, the first prosecutions were liable to consist largely of persons who publicly refused to register. This would raise "thorny selective prosecution claims."[7]

Mr. Jensen underestimated the effect of the passive enforcement program. At the time of the hearing, and continuing until the present time, persons prosecuted for failing to register have consisted solely, not largely, of vocal non-registrants. Mr. Jensen's memorandum shows that the Government was aware of the consequences of its passive enforcement policy. The inference is manifest that the defendant has been singled out for prosecution because he exercised his first amendment right to free speech.

Additionally, it is the opinion of this court that the Government's normal prosecutorial sequence was not followed in this case. The Department of Justice is the agency charged with the responsibility for deciding who will be prosecuted. After receiving names of young men from the Selective Service System, the names would be transmitted to the

appropriate United States Attorney. Ordinarily, it is the U.S. Attorney who would ultimately decide which non-registrants to prosecute.

It is clear to this court that agencies other than Selective Service and the Department of Justice have been involved in most of the decisions relating to prosecution of non-registrants. A nexus has been established between the White House, through Edwin Meese III, Selective Service, and the Department of Justice. Mr. Meese is also a member of the Presidential Military Manpower Task Force ("Task Force"), an agency established to advise the President on military personnel matters. Numerous documents disclosed to the defendant by the Government indicate White House interest in the prosecution of non-registrants.

Both Mr. Meese, as an individual, and the Task Force were concerned with questions

regarding "prosecutorial discretion." They also expressed concern with respect to the possible consequences of the policy the Government would choose to pursue. The involvement of Mr. Meese and the Task Force in prosecutorial policy decisions creates, at the very least, a strong inference of impropriety with regard to the Government's motive in seeking the prosecution of this defendant, and others similarly situated.

Once this court found that a prima facie case of selective prosecution had been established, the burden shifted to the Government to prove that its policy was not based on impermissible selective prosecution. The Government has failed to meet its burden.

On October 7, 1982, the court held a pre-trial evidentiary hearing on the matter of selective prosecution. At the hearing, the Government called David J. Kline, Senior Legal Advisor in the General Litigation and

Legal Advice Section in the Criminal Division of the United States Department of Justice. Mr. Kline's function is to render advice on and supervise the administration of certain federal statutes, among them 50 U.S.C. App. § 451 et seq.

Mr. Kline testified and documents were introduced through him at the hearing. In addition, the Government submitted affidavits of D. Lowell Jensen, Edward Frankle, former Associate Director, Selective Service System, Thomas K. Turnage and David J. Kline. Richard Romero, the Assistant U.S. Attorney prosecuting this case, also testified at the hearing. This constituted the Government's only attempt to rebut the prima facie finding.[8] After hearing Mr. Kline's testimony and examining the documents submitted by the Government, this court was convinced that the prima facie finding had not been rebutted. These documents were all introduced

into evidence and disclosed to the defendant. There was no objection by the Government to having any of these documents examined by the court or the defendant.

In preparation for the evidentiary hearing, the defendant requested that the Government produce certain additional documents and witnesses. After numerous orders by this court to produce these documents and witnesses, the Government declined to do so. The Government has based its refusal on a claim of executive privilege.

Since the Government had the burden of rebutting the prima facie case of selective prosecution, its refusal to comply with this court's orders reflects a curious strategy. It also raises serious questions as to whether the Government has pursued this case in good faith.

There is an obvious problem of proof whenever a defendant raises selective

prosecution claims. There is a presumption that a prosecution for violation of a criminal law is undertaken in good faith and in a non-discriminatory fashion. Falk, 479 F.2d at 620. However, when a defendant alleges intentional discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's motive, the presumption is questioned. Id. at 620-621.

The circumstances of the Falk case, which led to a prima facie finding of selective prosecution, are particularly relevant in this case. First, Falk was actively involved in counseling others on legal methods to avoid military service in Vietnam. Similar circumstances, in which a vocal dissenter was exercising his first amendment rights, led the Steele court to find selective prosecution.

One indication that Falk was prosecuted for exercising a constitutionally protected

right was the chain of officials that approved Falk's indictment. In addition to the Assistant U.S. Attorney who prosecuted Falk, the indictment was also approved by the Chief of the Criminal Division of the U.S. Attorney's Office, the First Assistant U.S. Attorney, the U.S. Attorney and the Department of Justice in Washington. The Falk court doubted that the usual procedure for prosecuting a draft case required such careful consideration from such a distinguished succession of officials. Id. at 622.

Wayte, like Falk, was actively involved in opposing draft registration. Wayte has written two letters to the President and given interviews to numerous media regarding his opposition to draft registration. Notwithstanding the assertions of the Government to the contrary, the list of officials involved in the prosecutive policy concerning non-registrants in the instant case is

much more impressive than that in Falk. The list begins with Mr. Meese and other White House staff. It continues with the Task Force, which includes, among others, Mr. Meese, the Secretary of Defense, the Director of the Office of Management and Budget, the White House National Security Advisor, the Chairman of the Joint Chiefs of Staff and the Director of Selective Service. Of the officials mentioned, it is apparent to this court that Mr. Meese was most prominently involved in the entire process. Furthermore, the Justice Department in Washington, D.C. was also obviously involved in the process. Finally, and appropriately, in the case of this defendant, the U.S. Attorney's office for the Central District of California actually sought the indictment. As in Falk, the involvement of high Government officials in enforcement and prosecution decisions regarding non-

registrants strongly suggests impermissible selective prosecution.

The Falk court was concerned with selective prosecution as it focused on one individual. The court emphasized that the officials mentioned had approved Falk's indictment. The circumstances in this case are different from Falk. The constitutional infirmity is the Government's passive enforcement system itself. It is important to emphasize that no party in this case, nor this court, has ever suggested that the White House (through Mr. Meese or any staff) or the Task Force were involved in the decision to prosecute this particular defendant.

However, this court is troubled by the fact that the Government's passive enforcement program leads only to indictments of vocal non-registrants.[9] The Government was very conscious of the effect its passive

enforcement policy would have on non-vocal non-registrants. In a statement that says much about the Government's attitude, one high Justice Department official stated, in a March 2, 1982 letter to Selective Service, that "the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning."[10] Although Mr. Jensen signed this letter, the above quoted phrase was drafted by Mr. Kline.[11] This is the same individual who testified as the Government's major witness in its brief attempt to rebut the finding of a prima facie case.

The March 2, 1982 letter recognized the passive program had potentially serious first amendment problems that would lead to selective prosecution claims. The Government was well aware of the Falk decision. The letter stated:

> In order to avoid the risk of initial losses of non-registrant cases and the probable consequences of diminishing registrations, we believe that Selective Service must create a program of active identification which will be functioning, or well on the way toward functioning, at the time of the first non-registrant prosecution.[12]

This, it has not done. Although the Government knew about the problems with the passive enforcement program, it chose to implement it. The Government must now accept the consequences of that choice.

There are other references to Government motives that cannot be reconciled with permissible prosecutorial discretion. The documents actually received into evidence in this case are replete with instances of discussions regarding the cost of the

enforcement programs. Mr. Meese was particularly concerned with this topic. Obviously, the passive program was less expensive to implement. Although an active enforcement program has been considered by the Government for about a year and a half, it is not yet in operation. An effort by the Government to save money is not adequate justification for violating a person's first amendment rights.

Numerous references have also been made regarding the effect of the first prosecutions on other non-registrants. It was felt that the first wave of prosecutions would encourage other non-registrants to register. Since the passive program was designed to prosecute only those most adamant in their refusal to register, indicting only vocal non-registrants made tactical sense. This would presumably have the greatest impact and result in significant numbers of men

registering for the draft. However, as Steele and Falk make clear, this policy violates the first amendment rights of the vocal non-registrants by selecting them, alone, for prosecution. The Government still retains a significant amount of prosecutorial discretion in deciding whom to prosecute. There is nothing in this decision to suggest otherwise. When this discretion is exercised, it must be done in a non-discriminatory manner.

While the Government refused to turn over certain documents to the defendant, it did make these documents available (in expurgated form, initially) to this court for an in camera inspection. After scrutinizing these documents, the court is reinforced in its belief that the nexus between the White House through Mr. Meese, Selective Service, The Task Force and the Department of Justice, which existed at the time the

prima facie finding was made, is still extant.

After carefully analyzing the arguments advanced by both parties, this court has determined that the prima facie finding has not been rebutted. Therefore, this court must grant defendant's motion to dismiss the indictment on the basis of the Government's policy of selective prosecution.

III. Selective Service Registration: Statutory Scheme

Defendant contends that the Military Selective Service Act ("Act"), 50 U.S.C. App. §§ 451 et seq., standing alone, does not establish the basis for criminal liability for one who refuses to register. In pertinent part, 50 U.S.C. App. § 453 provides:

> Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States,

... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder...

(emphasis added).

As indicated above, Congress expressly provided both that the executive branch should determine the appropriate time, place and manner for registration and that such decisions be expressed in rules, regulations and proclamations. In the case at bar, the indictment itself charges defendant with refusing to register "pursuant to the Military Selective Service Act, rules and

regulations duly made pursuant thereto, and Presidential Proclamation 4771 of July 2, 1980" (emphasis added). Congress intended that the Act merely be the foundation upon which to anchor a "statutory scheme."

Defendant cites three cases which address the role of regulations in the completion of a statutory scheme. Of the three cases, United States v. Mersky, 361 U.S. 431 (1960), is the most authoritative.

In Mersky, an information charged appellees with having violated 19 U.S.C. § 1304. Id. at 432. The District Court dismissed the information on the ground that the acts by defendants had not violated § 1034 because the applicable regulation was not sufficiently clear to justify a criminal prosecution. Id. at 433. The Government's appeal went directly to the Supreme Court. Id.

On the issue of the relationship between statutes and regulations, the Court stated:

> An administrative regulation, of course, is not a statute. While in practical effect regulations may be called little laws, they are at most but offspring of statutes.... Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of the command.... Once promulgated, these regulations called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete

> without the other, and only together do they have any force.

Id. at 437-38 (emphasis added). Furthermore, the Court held that "when the statute and regulations are so inextricably intertwined," the statutory scheme in its entirety will be subject to judicial scrutiny. Id. at 438.

Applying Mersky to the present case, defendant's argument that the court should view the applicable statute, regulations and proclamation as one statutory scheme is well founded.

Defendant has cited both Schweiker v. Gray Panthers, 453 U.S. 34 (1981) and Batterton v. Francis, 432 U.S. 416 (1977), as further support for his contention that regulations play an integral role in the overall statutory scheme. Both cases view administrative regulations as having "legislative effect" when it is clear that the regulations implement the congressional

intent which gave rise to a particular statute. Schweiker, 453 U.S. at 43-44; Batterton, 432 U.S. at 425.

It is apparent that this court must read the Act in conjunction with both the regulations found at 32 C.F.R. Part 1615 and Presidential Proclamation 4771 in order to ascertain whether the entire "statutory scheme" involving draft registration is valid.

A. The Registration Regulations at 32 C.F.R. Part 1615 and Executive Order 12044.

Defendant argues that the draft registration regulations were subject to the sixty-day notice and comment requirements of Executive Order 12044 rather than the normal thirty-day notice and comment period provided by the Act itself.[13]

Defendant contends that the initial decision of then Acting Director of the

Selective Service, Robert Schuck, to comply with Executive Order 12044's sixty-day notice and comment period should be given the force and effect of law.[14] Furthermore, defendant argues that acting Director Schuck's subsequent decision to allow thirty-two rather than sixty days for notice and comment, prior to the promulgation of the registration regulations, should lead the court to invalidate the provisions of the executive order and enforce the regulations.

The Government counters that the court has neither the jurisdictional authority to review the provisions of Executive Order 12044, nor the authority to enforce them. This court rejects the Government's first contention and accepts the second.

The Government appears to have confused the issue of the enforcement of executive orders with the more fundamental question

of whether judicial review of executive orders is appropriate. The primary authority cited by the Government in support of its position, Chrysler Corp. v. Brown, 441 U.S. 281 (1979), refutes the very principle which the Government urges this court to accept.

In Chrysler, the Court examined Executive Orders 11246 and 11375, which charged the Secretary of Labor with the responsibility of ensuring that Government contractors provide equal employment opportunities. Id. at 286. The Secretary of Labor promulgated regulations which required government contractors, such as Chrysler, to furnish reports and other information regarding their affirmative action programs and the composition of their work forces. Id.

The Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP")

promulgated regulations which required Chrysler to make certain documents available to the OFCCP's compliance agency. Additionally, the regulations provided public disclosure of information from OFCCP files. Id. at 284. It is the voluntary promulgation of the disclosure regulations, made pursuant to the executive orders, which the Government analogizes to Acting Director Schuck's voluntary embracement of the sixty-day notice and comment period.

The Government, at one point in its opposition papers, argues that Chrysler stands for the proposition that regulations and executive orders which do not have a statutory foundation are not reviewable by an Article III court.[15] However, a mere three sentences from that assertion is an acknowledgement by the Government of the fact that the Supreme Court did, indeed, review both the regulations in question and

related executive orders. Clearly, an Article III court is not proscribed from reviewing the question of the enforceability of an executive order, irrespective of an attempt by the executive branch to make review an intra-branch function.[16]

The Government also relies heavily on Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965), cert. denied, 482 U.S. 978 (1966), and its progeny as support for its position on judicial review of Executive Order 12044. In Gronouski, the President issued Executive Order 10988 in an attempt to further his personal policy of enhancing the attractiveness of federal employment. Id. at 452.

Gronouski, like Chrysler, addressed the enforceability rather than the judicial reviewability of executive orders. The Government's assertion that Gronouski is irreconcilable with the concept of judicial review

of executive orders must be rejected.

This court questions whether the Government is sincere in its position regarding judical review of executive orders. The Government's position, if accepted by this court, would result in the vesting of executive jurisdiction over the question of the enforceability of executive orders within an Article I agency (the Office of Management and Budget). To accept such a position would cut against the very fabric of the Constitution which mandates that, in cases such as the one at bar, it is the province of an Article III tribunal, rather than the Office of Management and Budget, to review the question of the enforceability of the executive pronouncement. Cf. Marbury v. Madison, 5 U.S. 87, 111, 1 Cranch 137 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").

Turning to the question of enforcement itself, this court agrees with the Government that the President alone has the authority to enforce the sixty-day notice and comment provision of Executive Order 12044. The court concurs with the Government's assertion that Executive Order 12044 is without a statutory genesis. Absent the requisite legislative foundation, the executive order is without the force and effect of law. Therefore, its enforcement is subject to the discretion of the President. The following cases, when read together, stand for the proposition that executive orders without a legislative genesis have no legal force and effect.

In Gronouski, the court addressed the question of whether the Postmaster General had violated Executive Order 10988. The court stated that the executive order in question had merely established a "broad

policy," and that it was the responsibility of the Postmaster General to decide how to implement that policy. In addition, the court stated that the executive order

> had no specific foundation in Congressional action.... It represented simply one President's effort to move in the direction of what had been advised by his experts would be an improvement in the efficiency of federal government....[The] action [by the Postmaster General] does not seem to us to conflict with the Executive Order. But, even it it did, it does not follow that appellants have a right of such a nature as to warrant intervention by an equity court.

Id. at 456-57.

Next, the Seventh Circuit addressed the question of whether executive orders have

force and effect of law. In Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973), a federal civil service employee brought an action against a federally recognized union that expelled her from membership. Id. at 189.

The court addressed the issue of whether "Executive Orders, like congressional enactments, have the force and effect of 'laws ... of the United States.'" Id. at 190. The court stated that in those cases in which executive orders have been granted the force and effect of law, they had been issued "pursuant to statutory authority." Id. Finding an absence of the requisite statutory authority in Carey, the court held that the executive order in question was without the force and effect of law. Id. at 190-91.

Other circuits have stated similar views. In Local 1498, American Federation of Government Employees v. American Federation of Government Employees, AFL-CIO, 522 F.2d 486

(3d Cir. 1975), the district court denied plaintiffs leave to sue under the Labor-Management Reporting Disclosure Act of 1959. Id. at 487-88. Plaintiffs appealed, and the court of appeals affirmed holding, inter alia, that the executive order was not a "law of the United States." Id. at 490-91.

The Third Circuit found:

> [The executive order] was not issued under the statutory authority providing for presidential implementation or effectuation of statutory provisions.... Hence, while Executive Order No. 11491 regulates and implements federal government personnel policies, it does so solely as a product of executive authority and not as a consequence of congressional law making. Accordingly, this Executive Order ... cannot attain the status as [sic] a "law of the

United States."

Id. at 491 (emphasis added).

In Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir.), cert. denied, 424 U.S. 966 (1975), plaintiffs sought declaratory and injunctive relief against the implementation of federal Department of Agriculture regulations. Id. at 231. The district court granted a permanent injunction and defendants appealed. Id. The court of appeals dissolved the injunction holding, inter alia, that the executive order involved in the case did not have the force and effect of law. Id. at 236.

The court reiterated the general rule that "Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. Id. at 234 (citations omitted). After an historical analysis of the intent of the framers of the

United States Constitution, the court found that the President may not "act as a lawmaker in the absence of a delegation of authority or a mandate from Congress." Id. at 235. The court went on to hold that in enacting Executive Order 11821, the President had not been responding to a congressional delegation of lawmaking authority. Therefore, Executive Order 11821 was not given the force and effect of law. Id.

The most recent case on point comes from the Fourth Circuit. In Liberty Mutual Insurance Company v. Friedman, 639 F.2d 164 (4th Cir. 1981), certain insurance companies challenged the district court's conclusion that the companies were government subcontractors and, thus, subject to certain requirements of Executive Order 11246. Id. at 165. After a lengthy analysis of possible statutory bases for Executive Order 11246, the court of appeals reversed, concluding

that the Order was not authorized by Congress. Id. at 172. The court held that in the absence of congressional authority, the executive order was without the force and effect of law. Id.

Furthermore, in a footnote, the court stated that the possibility that authorization for the executive order might be found independently of a statutory source in the "inherent powers" of the President "is completely foreclosed by Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952) ...." Liberty Mutual, 639 F.2d at 172 n.13, citing Youngstown, 343 U.S. at 587. In Youngstown, the Court held that the "inherent powers of the President," under his authority as Commander-In-Chief, did not support his executive order directing seizure of the steel mills during the Korean conflict. The Court found the President's action to be legislative in nature, and, in

the absence of any delegation of lawmaking authority from Congress, none could be inferred. Id. at 172.

Applying the holdings of the above-cited cases to the present case, this court must first find that Executive Order 12044 was issued pursuant to statutory authority before this court may enforce the sixty-day notice and comment provision against the Selective Service. On the face of the executive order there is no mention of any underlying statutory basis. This court is unaware of any statute which serves as a foundation for the executive order.

The Director of Selective Service had no more than an obligation to issue regulations after a thirty-day notice and comment period. His decision to allow thirty-two days, rather than sixty days, is not a proper matter for judicial concern. Absent a clear and definite legislative genesis upon which

to anchor the executive order in question, the decision to enforce the order's provisions rests with the Chief Executive rather than with the judicial branch.

Therefore, defendant's motion to dismiss the indictment due to the illegal promulgation of the registration regulations must be denied.

B. Presidential Proclamation 4771

Defendant contends that the Proclamation announced, on its face, that it was effective immediately upon publication and that the initial registration period began a mere three weeks from the publication date. Defendant argues that the Proclamation was subject to the thirty-day notice and comment requirement prescribed by the Act, 50 U.S.C. App. § 463(b). In enacting § 463(b), Congress provided that "no regulation issued under the Act shall become effective until thirty

days following the date ... such regulation has been published in the Federal Register."

Interestingly, the Government does not dispute the fact that if the Proclamation had been a regulation, it clearly would have been subject to the thirty-day notice and comment requirement. However, the Government argues that Congress did not intend to include presidential proclamations within the requirements of § 463(b) because the word "proclamation" did not appear on the face of the statute. Defendant argues that where Congress envisions a statutory scheme, i.e., a statute to be accompanied by rules, regulations and proclamations, it is reasonable to infer that Congress intended to subject both regulations and proclamations to the same notice and comment requirements.

During the debate in Congress over the enactment of § 463(b), Senator McIntyre, who co-sponsored the measure, stated that:

Presently the Selective Service System issues the bulk of its regulations in the form of executive orders. The remainder are issued by the Director. Although these regulations are published in the Federal Register, they are effective on the date they are issued. This poses a problem because it gives no lead time for persons who are affected by the regulations to become aware of them .... The Amendment under consideration would correct the possibility of this kind of occurrence.

117 Cong. Rec. 10487 (June 17, 1971) (emphasis added).

Numerous courts have held that presidential proclamations, executive orders and administrative regulations all have the force and effect of law when accompanied by the

proper statutory foundation.[17] Each of those courts has seen fit to use the terms "rules," "regulations," "orders," and "proclamations" interchangeably when the particular facts of cases before the courts called for the court to do so.

One example is provided by Hampton and Co. v. United States, 276 U.S. 394, 406 (1928), in which the court characterized a presidential proclamation as a lawful exercise of the President's discretion to make "public regulations" interpreting a statute. Furthermore, two district courts have ruled on the interpretation of the term "regulation" in 50 U.S.C.App. § 463(b).

In Piercy v. Tarr, 343 F.Supp. 1120 (N.D. Cal. 1972), plaintiffs were selective service registrants who were classified as conscientious objectors by the Selective Service System. Id. at 1121. Plaintiffs argued that the promulgation by the Selective

Service of certain informal "directives" was contrary to the mandatory pre-publication requirements of § 13(b) of the Act and the implementing executive order. Id. The district court found for plaintiffs and issued a permanent injunction which prevented the defendant from enforcing the civilian work order in dispute. Id. at 1129.

On the issue of whether "directives" from the Director of Selective Service are subject to the notice and comment requirements for "regulations," the court held:

> [T]he directives here involved, which purported to alter significantly the rules and regulations ... , are required to be published in conformity with [50 U.S.C. App. § 463(b)].
>
> . . . .
>
> ... [I]t matters little whether [the] directive is a "rule", an "order", or a set of "instructions", or only a sui generis "directive" .... The court cannot hold that the publication requirements of the Act hinge on the particular format the Selective Service System chooses to issue authoritative instructions couched in mandatory terms.

Id. at 1128. The court refused to allow defendants the opportunity to "rely on the narrow references to 'regulations' in ... 50 U.S.C. App. § 463(b)" as a basis for avoiding its mandate. Id. See also Gardiner v. Tarr, 341 F.Supp. 422 (D.D.C. 1972) (declarations of policy with force and effect of law are subject to the notice and comment requirements of § 463(b) even though not "rules" or "regulations").

Likewise, in the case at bar, this court rejects the Government's contention that because the Proclamation is not a "regulation,"

it is not subject to the notice and comment requirements of § 463(b). This court will refrain from engaging in the semantic gymnastics that the Government offers. Simple logic dictates that, in light of the facts of this case, "proclamation" should be read as "regulation" for the purposes of the notice and comment requirement of § 463(b).

On the very face of the Proclamation, President Carter declares that he is issuing the proclamation "by the authority vested in me by the Military Selective Service Act." 45 Fed. Reg. 45247 (July 2, 1980). Along with the congressional grant of authority cited by President Carter came the responsibility to guarantee a thirty-day period to the final publication of the proclamation for notice and comment. Absent an effective waiver by the President of the notice and comment requirement, the noncompliance with

§ 463(b)'s prescription provides a basis for invalidating the provisions of the Proclamation.

The Government argues that if the notice and comment provision is applicable to presidential proclamations, it was waived by President Carter. Section 463(b) provides, in part:

> The requirements of this subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such regulations would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued.

(Emphasis added).

The Government argues that President Carter's statements regarding Afghanistan and the Soviet Union were made in an effort

to provide public notice of the fact that he was waiving the thirty-day notice and comment requirement.[18] This court does not agree with the Government's contention that statements made by President Carter, at the time he issued Presidential Proclamation 4771, amounted to a clearly articulated and legally sufficient waiver of the notice and comment requirement.

Finally, the Government advances the meritless argument that, even assuming President Carter should have complied with § 463(b), any error resulting from his failure to comply was made in "good faith," and, hence, it should be disregarded. The Government does not address the fact that the "harmless error" argument appears particularly ill-conceived in the context of a criminal prosecution involving one who allegedly defied the proclamation at issue. Irrespective of whether the error was made

in good faith, it could hardly be characterized as "harmless error." This court cannot accept the Government's final argument.

The court recognizes the widespread effect that a decision granting defendant's motion to dismiss due to the illegal promulgation of the Proclamation of the Proclamation will have on this nation's selective service registration program. However, justice compels the court to grant defendant's motion. The proclamation in question was neither expressly nor impliedly exempted from the thirty-day notice and comment requirement of § 463(b). The court cannot close its eyes to the fact that the proclamation became effective a mere twenty-one days after it was published. What might appear a minor breach of the mandate of § 463(b) takes on far greater significance in the context of criminal liability emanating

from a defective component of the draft registration's statutory scheme.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss is granted and the indictment shall be dismissed. The dismissal is with prejudice, and is based on a finding of discriminatory prosecution. As a separate and independent basis for dismissal of the indictment, this court has found the time, place and manner requirements of Presidential Proclamation 4771 are invalid.

Dated: November 15, 1982

TERRY J. HATTER, JR.
United States District Judge

FOOTNOTES

1. On October 29, 1982, this court issued an Order which set out the court's rationale for making its prima facie finding of selective prosecution. Additionally, the October 29th Order directed that the Government provide defendant with certain documents and that Edwin Meese III, Counselor to the President, testify at the evidentiary hearing or selective prosecution. The Order specifically addressed the Government's contention that defendant should not receive any of the documents due to the Government's invocation of a qualified executive privilege.

The October 29th Order stated in part:

> The standard for determining whether an assertion of executive privilege is valid was announced in United States v. Nixon, 418 U.S. 683 (1974).

Applying the balancing test from Nixon to the facts, this court finds that the scales of justice tip decidedly in favor of the defendant's right to review several of the documents which this court has inspected in camera. The Government's generalized assertion of a "deliberative process" executive privilege must yield to the defendant's specific need for documents, which this court has determined must be released to Mr. Wayte.

2. It is of particular interest to this Court that Sirica involved issues of both civil and criminal procedure. The circuit court was quite careful to point out that the President could seek an interlocutory appeal of the District Court's rulings under 28 U.S.C. § 1291 (interlocutory appellate review in civil proceedings) while the

Special Prosecutor could seek review under 18 U.S.C. § 3731 (interlocutory appellate review in criminal proceedings). See Nixon v. Sirica, 487 F.2d 700 at 721, n.100.

The relevant part of 18 U.S.C. § 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court's suppressing or excluding evidence ... if the United States

Attorney certifies to the district court that appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the ...order has been rendered and shall be diligently prosecuted. . . .

The provisions of this section shall be liberally construed to effectuate its purposes (emphasis added).

3. Since that date, two more young men have been indicted, bringing the total to thirteen. These two additional men are also vocal non-registrants.

4. Hereafter referred to as "Jensen Memo of July 9, 1982."

5. On December 1, 1981, 50 U.S.C. App. § 462 was amended to add subsection (e). It states:

(e) The President may require the Secretary of Health and Human Services to furnish to the Director, from records available to the Secretary, the following information with respect to individuals who are members of any group of individuals required by a proclamation of the President under section 3 [section 453 of this Appendix] to present themselves for and submit to registration under such section: name, date of birth, social security account number, and address. Information furnished to the Director by the Secretary under this subsection shall be used only for the purpose of the enforcement of this Act.

6. A law student working for the defense phoned four states at random (Iowa, Michigan, Texas and Colorado) in an effort to see whether a list of eighteen-year-old persons was available. The law student found that such lists were easily obtainable. By comparing those lists with the Government's list of men who have actually registered, one should be able to identify non-vocal non-registrants.

7. Jensen Memo of July 9, 1982.

8. Edward Frankle was scheduled to testify for the Government at the evidentiary hearing. As a result of time constraints, Mr. Frankle was not called to testify on October 7, 1982. He ultimately did not testify because the evidentiary hearing was never resumed.

9. Of the thirteen men who have been indicted, twelve have been self-reported and one has been reported by others.

10. Letter dated March 2, 1982 from D. Lowell Jensen, Assistant Attorney General, Criminal Division to Herbert C. Puscheck, Associate Director, Plans and Operations, Selective Service System. (Hereafter "Jensen Letter of March 2, 1982.")

11. R.T., October 7, 1982 at 53.

12. Jensen Letter of March 2, 1982.

13. In the relevant part, 50 U.S.C. App. § 463(b) provides that "no regulation issued under the [Military Selective Service] Act shall become effective until ... thirty days following the date on which such legislation has been published in the Federal Register."

14. On October 31, 1978, Acting Director Schuck issued a report which stated: "In accord with Executive Order 12044, at least 60 days will be allowed for comment on proposed regulations in the future." 43 Fed. Reg. 50981.

Executive Order 12044 provides, in pertinent part:

Section 1 Policy. Regulations shall be as simple and clear as possible ....

To achieve these objectives, regulations shall be developed thr through a process which ensures:

. . . .

(c) opportunity exists for early participation and comment by other federal agencies, State and local governments, ... and individual members of the public

....

Section 2 Reform of the Process for Developing Significant Regulations.

....

(c) Opportunity for Public Participation. Agencies shall give the public an early and meaningful

opportunity to participate in the development of agency regulations.... Agencies shall give the public at least 60 days to comment on proposed significant regulations. In the few instances where agencies determine this is not possible, the regulation shall be accompanied by a brief statement of the reasons for a shorter time period.

....

....

Section 6 Coverage

....

(b) This Order does not apply to:

... (2) regulations issued with respect to a military or foreign affairs function of the United States.

15. See Government's Opposition to Defendant's Motion to Dismiss re Illegal Promulgation of Selective Service regulations and

Presidential Proclamation 4771, Memorandum of Points and Authorities, at 6-8.

16. "Summary and Analysis of Public Comments" for Executive Order 12044 which asserts that the enforcement of Executive Order 12044 rests with the Office of Management and Budget within the Executive Branch. Here again, the Government attempts to buttress its arguments against judicial review with a comment concerned with judicial enforcement.

17. In fact, almost without exception, each of the courts in the above-cited cases concerning the legal effect of Executive Order 12044 has mentioned in dictum its support for such a proposition. Cf. Liberty Mutual, 639 F.2d at 167; Independent Meat Packers, 526 F.2d at 234; Local 1498, 552 F.2d at 491; Carey, 483 F.2d at 190-91; Gronouski, 350 F.2d at 456.

18. Upon signing Presidential Proclamation 4771, President Carter stated that he was "deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union and occupation by them of this innocent and defenseless country ...." 16 Weekly Compilation of Presidential Documents 1274 (1980).

IV.

DECLARATIONS AND EXHIBITS REGARDING MEN INDICTED BY PASSIVE ENFORCEMENT SYSTEM

DECLARATION OF WILLIAM G. SMITH

WILLIAN G. SMITH declares as follows:

1. I am an attorney of record duly authorized to practice before this court. I am one of the counsel for defendant David Alan Wayte in the above-entitled case.

2. I am the chairman of the Los Angeles Selective Service Law Panel, ... In my capacity as chairman of the aforesaid Panel, I have had many occasions to talk to and correspond with all of the defendants in criminal prosecutions now pending in various Federal District Courts involving failure to register under the Military Selective Service Act. In the course of my conversations and correspondence with said defendants, I have been able to ascertain the manner by which the government was able to identify each defendant in said cases.

3. Attached to this Declaration is a

Table of all such indictments under the Military Selective Service Act, showing the name of each defendant, the date each defendant was indicted, the place where each defendant was indicted, the manner by which the government was able to identify each defendant, and the Exhibit attached to this Declaration which supports the statements made in this Declaration relative to each defendant.

4. According to the information I have developed through talking with the defendants listed in the attached Table, through talking with their attorneys, and through correspondence with each defendant or his attorney, I have learned that each of the defendants was identified by the government as follows:

a. Benjamin H. Sasway wrote a letter to the President on July 24, 1980 expressing his opposition to the draft registration program. On June 30, 1981, in response to

a warning letter from Selective Service, he wrote to Selective Service, again stating his opposition to draft registration. Mr. Sasway was a vocal and public opponent of the draft registration program from its inception, and has been the subject of numerous press, radio and television interviews. See Exhibit A for confirmation of these statements.

b. Enten Eller - Enten Eller wrote a letter to Selective Service on August 15, 1980, expressing his opposition to the draft registration program. Later, he wrote letters to the United States Attorney for the Western District of Virginia, the United States Attorney for the Central District of California, and the Honorable Jim Lloyd, Congressman for the 35th Congressional District of California, advising these people that as a matter of conscience he could not register for the military draft. Mr. Eller

is a member of the Church of the Brethren, and his views and position were widely known throughout his religious community. See Exhibit B for confirmation of these statements.

c. David Alan Wayte - David Alan Wayte is the defendant in this action. David wrote to the President and to the Selective Service System on August 4, 1980, expressing his opposition to the draft and his determination not to register. Since that time, David has been a public and vocal opponent of draft registration, and has appeared on numerous television and radio programs to express his opposition to the draft. In addition, Mr. Wayte has been the subject of numerous newspaper interviews, wherein he expressed his opposition to the draft registration program and conscription. See Exhibit C for a confirmation of these statements.

d. Mark Arden Schmucker - Mark

Schmucker wrot a letter to the Selective Service System on August 10, 1980, expressing his opposition to the draft and to the registration system. Mark has been a public and vocal opponent of the draft registration program from its inception. He was a member of a group at Goshen College, Indiana which opposed the draft registration program and wrote articles for publication in which he expressed his strong opposition to the program. See Exhibit D for a confirmation of these statements.

e. Russell F. Ford - Russell Ford wrote a letter to President Reagan on November 29, 1981, expressing his opposition to the draft and vowing never to register. Russell has been a vocal and public opponent of the draft registration program. He has been the subject of numerous television, radio and newspaper interviews, in which he always expressed his opposition to the

registration program. See Exhibit E for confirmation of these statements.

f. Gary John Eklund - Gary Eklund is an active member and participant in the Catholic Worker organization in Iowa. On January 3, 1981 he wrote a letter to the Selective Service System, expressing his opposition to the registration program. He has been extremely active and vocal in his opposition to the draft, and has been the subject of numerous television, radio and newspaper interviews. See Exhibit F for a copy of his letter to Selective Service.

g. Gillan Kerley - Gillan Kerley wrote to Selective Service on September 1, 1981 to express his opposition to the draft registration program. He has been active in numerous anti-draft organizations since the inception of the draft registration program. He has written various newspaper articles in which he expressed his opinion in opposition

to the draft. He has also been the subject of numerous radio, television and newspaper interviews. See Exhibit G for confirmation of these statements.

h. Michael McMillan - Michael McMillan attended a press conference on July 21, 1980 to announce that he would not register for the draft. He wrote to the Director of Selective Service on June 2, 1981 to reiterate his opposition to the registration program. On October 1, 1981, he wrote to David Kline of the Department of Justice to express his opposition to conscription. He has also been the subject of numerous radio, television and newspaper interviews. See Exhibit H for confirmation of these statements.

i. Charles Epp - Charles Epp wrote to the Selective Service System on February 7, 1981 to announce his opposition to the draft. He sent an identical letter to

President Reagan and to one of his Senators. Mr. Epp is a member of the Mennonite Church, and has been extremely vocal and public about his refusal to register, especially among individuals in his religious community. Mr. Epp has been the subject of several newspaper interviews, two of which are included with the attached Exhibit. See Exhibit I for further confirmation of these statements.

j. Kendal Warkentine - Kendal Warkentine is a fellow student of Charles Epp (see item i, page 5). He wrote to Selective Service and the President in August, 1980 to express his opposition to the draft registration program. He was also the subject of one of the two newspaper interviews attached as Exhibit I. Mr. Warkentine has been a public and vocal opponent of the draft since its inception, and is well known in his religious community as an opponent of

conscription and registration. I talked to Mr. Warkentine on October 16, 1982 by telephone, and he indicated that he would send me a further declaration concerning his activities against the draft in the near future. If said declaration is received before the hearing in this matter on October 21, 1982, it will be filed as a supplementary exhibit to this Declaration.

k. Russell Martin - Russell Martin is another member of the Catholic Worker group (see description of Gary Eklund) who have taken a public position against the draft. Russell is active in student government at the University of Northern Iowa, and has been very public and vocal in his opposition to the draft. Russell sent a letter to Selective Service on January 5, 1981 to inform them that he had not registered. The United States Attorney in the Northern District of Iowa informed Russell

on November 2, 1981 that he had been "constructively" registered for the draft, because he had furnished sufficient information to the government to enable the U.S. Attorney to fill out the registration form for Russell. However, after Defendant David Wayte made several discovery requests concerning Russell's constructive registration, the U.S. Attorney in Iowa changed his position and Russell was indicted on October 5, 1982. See Exhibit J for confirmation of these statements.

l. Edward John Nasbrouck - Edward Nasbrouck has been one of the most vocal and militant opponents of the draft registration program since its inception. Edward is active with Mass. Open Resistance in Cambridge, Massachusetts. He has made numerous television, radio and public appearances in opposition to the draft. On October 3, 1981, Mr. Nasbrouck wrote a letter which was sent

William French Smith, the Attorney General; the Director of Selective Service; the Chief Justice of the Supreme Court; President Reagan; Vice-President Bush; Thomas P. O'Neill, Speaker of the House of Representatives; Edward M. Kennedy; Paul Tsongas; and Margaret Heckler, his Congresswoman. In his letter, Mr. Nasbrouck expressed his militant opposition to the draft and his determination not to register. In his letter, he described a press conference he had attended in Chicago, Illinois on July 17, 1980, at which time he announced his intention not to register. See Exhibit K for a confirmation of these statements.

m. Paul Jacob - Paul Jacob is probably the person who is named in the sealed indictment which has been alluded to in oral argument in this case. I have been in contact with Paul Jacob on several occasions during the last 15 months, and he is a

familiar figure in the draft resistance movement. When I heard rumors that he had been indicted, I called his parents in North Little Rock Arkansas, [501] 753-6001, and confirmed that he had apparently been indicted. My call was placed on October 5, 1982. Earlier this year, Mr. Jacob made several public appearances in various parts of the country, at which he announced that he had not registered for the draft and that he intended to go "underground" rather than permit the government to bring him to trial. I believe the indictment in this matter is sealed berause the government has been unsuccessful in locating him. Although I am not certain how Mr. Jacob came to the attention of the government, it is quite apparent that he was one of the most visible of the draft resisters and draft opponents in the anti-draft movement. Attached as Exhibit L is an affidavit from Gillan Kerley.

one of the other individuals who has been indicted for failing to register, indicating that Mr. Jacob was a speaker at an anti-draft rally in Madison, Wisconsin on July 11, 1982. Included in Exhibit L is a copy of the leaflet advertising Mr. Jacob's appearance in Madison, and indicating that he was appearing as a member of "Students for a Libertarian Society". Exhibit L also contains two newspaper articles concerning the rally at which Mr. Jacob spoke.

If Mr. Jacob did not write to Selective Service or some other governmental agency, he made no attempt to hide his resistance to registration. He was interviewed by several radio and television stations, and was the subject of numerous newspaper articles concerning draft resisters. I have had one newspaper reporter call me on at least two occasions to discuss Mr. Jacob, and he informed me that Mr. Jacob was the

subject of considerable interest in the news media. Mr. Jacob attracted unusual interest because of his stated determination to avoid trial by hiding from governmental authorities - a position which was unusual for most draft resisters. However, at the same time he made every effort to call attention to himself by seeking out members of the news media, and calling "press conferences" to announce his opposition to the draft registration program.

If Mr. Jacob was called to the attention of the government by some 3rd party, it was only because he was one of the most visible and vocal opponents of the draft registration program. On October 18, 1982, defendant filed a "Request For Materials Re Evidentiary Hearing On Discriminatory Prosecution" with this court. In said Request, defendant has requested the government to supply information concerning the

manner in which indictees identified by informants first came to the attention of said informants. We believe this will disclose that Mr. Jacob was indicted because he was a vocal and visible opponent of the draft registration system.

5. All of the information contained in this Declaration was obtained by me through personal contact with the individuals who have been indicted and through contact with their attorneys and family members. I made contact with all of the individuals who have been indicted many months before the indictments were handed down. I had no difficulty in locating these men because they were all among the most vocal and public draft resisters, and many had important positions of leadership in anti-draft organizations. I do not currently know the location or whereabouts of Paul Jacob. Mr. Jacob did not seek advice from

me in making his decision to avoid apprehension. However, before he disappeared from public view, I had no difficulty in locating him or learning about his anti-draft activities. Mr. Jacob, along with all of the other 12 men subject to indictment, has always been a public non-registrant. Each individual became known to me because of his vocal and public exercise of First Amendment rights - including the right to speak out against government policies about which each person had strong feelings and disagreements.

I declare the foregoing to be true and correct under penalty of perjury. Executed the 18th day of October 1982 at Los Angeles, California.

/s/
William G. Smith

EXHIBIT 1a TO APPENDIX E

TABLE OF INDICTMENTS THROUGH OCTOBER 17, 1982 SHOWING MANNER BY WHICH GOVERNMENT LEARNED OF DEFENDANT'S IDENTITY

(11) TABLE I

(Listed as follows: Name of Defendant; Date of Indictment; Place of Indictment; Manner of Identification by Government; Exhibit Reference)

1. Benjamin H. Sasway: June 30, 1982: So. Dist. Calif - San Diego: Passive Enforcement System - Self-Report: Exhibit A.

2. Enten Eller: July 13, 1982: W. Dist. Virginia - Roanoke: Passive Enforcement System - Self-Report: Exhibit B.

3. David Alan Wayte: July 22, 1982: Central Dist. Calif. - Los Angeles: Passive Enforcement System - Self-Report: Exhibit C.

4. Mark Arden Schmucker: July 22, 1982: N. Dist. Ohio, E. Div. - Cleveland: Passive Encorcement System - Self-Report: Exhibit D.

5. Russell F. Ford: July 30, 1982: D. of

Conn. - Hartford: Passive Enforcement System - Self-Report: Exhibit E.

6. Gary John Eklund: August 31, 1982: S. Dist. of Iowa Des Moines: Passive Enforcement System - Self-Report: Exhibit F.

7. Gillan Kerley: September 8, 1982: W. Dist. Wisconsin - Madison: Passive Enforcement System - Self-Report: Exhibit G.

8. Michael McMillan: September 8, 1982: W. Dist. Wisconsin - Madison: Passive Enforcement System - Self-Report: Exhibit H.

9. Charles Epp: September 21, 1982: Dist. of Kansas - Wichita: Passive Enforcement System - Self-Report: Exhibit I.

10. Kendal Warkentine: September 21, 1982: Dist. of Kansas - Wichita: Passive Enforcement System - Self-Report: See Declaration

11. Russell Martin: October 5, 1982: N. Dist. of Iowa - Cedar Rapids Division, Passive Enforcement System - Self-Report: Exhibit J.

12. Edward J[illegible] Nasbrock: October 6, 1982:

Dist. Mass. - Boston: Passive Enforcement - Self-Report: Exhibit K.

**13. Paul Jacob: Unknown Probably Late Sept., 1982: E. Dist. Arkansas - Little Rock: Passive Enforcement System - 3rd Party Report Based Upon Awareness of Publicised Activities Against the Draft: Exhibit L.

** Sealed Indictment

EXHIBIT A

Benjamin H. Sawyer
804 Oro Ave Drive
Vista, CA 92083
July 24, 1980

President Jimmy Carter
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing you this letter today, the day I'm supposed to register for the draft, as a symbolic statement of my opposition to all military conscription. This letter serves the dual purpose of being a defense of my decision not to register and a discourse on the American Armed Forces and the problems they're having getting qualified recruits.

I feel compelled by my conscience to state honestly and openly that I am not registering for the draft. I am obligated to protest even simple registration since I feel the spirit of this mandate, like the actual conscription, is amoral and incompatible with a free society. Furthermore, I

cannot allow myself to be forced into a military establishment that is too misdirected and too conservative to serve the country's best interests.

The assumption and underlying spirit of draft registration is that the draft is O.K. if the world situation gets bad enough to warrant its use (i.e. increasing world tension or all out war). I am opposed to military conscription no matter what the world situation is like. Consequently, I am opposed to draft registration and the spirit in which it is used. I must protest draft registration just as I would protest the actual draft.

I strongly believe that draft registration is morally wrong, unjustified in the spirit of the United States Constitution, and more generally, incompatible with a truly free society. It is wrong to make law abiding citizens do anything against their

will, especially if it is to learn to kill. To deprive people of their basic rights, freedom of choice (jobs and places to live), freedom of speech, and freedom to be who they wanto to be, is a callous erosion of the American Constitutional Heritage. Our society should, year by year, improve, expand, and equalize these traditional freedoms, not systematically take them away.

My second major reason for refusing to register is that the military just isn't doing its job and that I couldn't trust it to use my life effectively to defend our country. I love my country and would defend it in a time of crisis.. Under the current circumstances, however, I could easily be doing a job that is hardly defense oriented. The reason for this is that the military is not really interested in just defending our country. I seems equally important to the Pentagon that military forces also defend business interests abroad, and antiquated

Soviet containment Policy, the mythical American Honor, and just generally the military status quo. These are not natural extensions of American defense. These are wrong, and I cannot allow myself to be a tool to such misdirection. So, I cannot allow myself to be conscripted.

The draft is such an important issue at this point because the military cannot fill its quotas with qualified men and women. It is important, therefore, to look at the reasons these quotas aren't filled and why many people don't want anything to do with the Armed Forces. It is helpful in this discussion to look at two major reasons why a person might want to join the military. The first general reason is to get the material benefits that the Armed Forces have to offer. The second reason is, for lack of a better word, the spiritual benefits of the military, the honor and pride of deferding one's country.

I am sorry to say that the military falls short of catering to either of these needs. The best way to eliminate the necessity for having a draft is to make people want to join the military.

The Armed Forces recruiters have done the best job of enticing young people to become recruits when they have presented the material benefits, i.e., money, educational benefits, etc.. The educational benefits are actually quite good. The basic pay, however, is substandard, especially when compared to equable jobs in the civilian world. I've heard career people in the services say that they stay in the military in spite of the pay. Many others, however, are not re-enlisting and are choosing jobs in the civilian world when they feel they can support their families better by doing so. This wage inadequacy is a grave mistake especially when it deters the most needed

personnal, those with technical skills, from re-enlisting. The easiest step toward filling the military quotas, with people that are motivated by the benefits, is to make wages adequate for supporting a family and living a decent life.

People who are financially secure and have access to an education are much harder to get to join the Armed Forces for the obvious reason that their basic physical needs are met. Some of these people would join the military just to have the satisfaction of knowing they have served their country by helping defend it. Such people, myself included, are easily discouraged, especially in view of today's military. Special effort should be made to keep these people from becoming discouraged since they can contribute to filling the ranks and thus dispelling the contrived need for a draft. Several obstacles are standing in the way

of this, however.

People aren't serving their country by joining the military for many of the same reasons I oppose registration and the draft. Most important of these is the military misdirection mentioned above. People today cannot be secure in the knowledge that they are joining the military to defend their country. It is just as likely they would be put to defending someone else's country, or even worse, someone else's natural resources. To many, like myself, meaning in life is very important. Some of us are worried that our lives might be wasted in Afghanistan by an overjealous leader, just as lives were wasted a generation ago in Viet Nam.

To cure this fear the American Military must be re-aligned so it is certain that recruits won't fight needless wars and that their primary purpose is defending the United States. The way to do this as I see it is to

restructure the military system so that it is not offense, weaponry oriented. It is ridiculous to expect anyone in this country to believe, let alone the rest of the world, that our efforts for world peace are genuine with such sophisticated assault capabilities. I believe that the millions spent on offensive weapons should be drastically cut and put instead into areas that are defense oriented, pay raises and domestic defense (the reserve and coast guard). Only then can recruits be sure that their lives won't be wasted needlessly.

Another major obstacle that is keeping people from joining the military to reap the spiritual benefits is the detrimental effect the military can have on a person's personality. One can expect upon joining a branch of the Armed Forces, to be stripped of all individuality and personal dignity in the name of discipline, discipline that is

not necessarily beneficial. Recruits are fed into a giant military machine to emerge wearing the same clothes, having the same haircut, and thinking and acting the same as thousands of other recruits. A person's identity is too important to sacrifice needlessly, especially for a military that is not necessarily doing anybody any good.

It is very possible to defend our country without sacrificing one's individuality. It is also as possible to train to defend one's country in a sweat suit or warm up suit as it is in the olive drab army issue. Perhaps a creative look at military regulations to determine which ones are actually needed for an efficiently working system would be helpful now. If it allows more freedom, it will get more recruits.

The third and final obstacle which is keeping people from joining the military is the fact that people lose control over

their own lives. Some are reluctant to join when they will be deprived of the choice as to where to live and what job to do. The final decision about what a person is going to do and where he or she is going to do it, as well as many other important personal decisions, are made by superior officers who may have little regard for the recruit's wishes. To get people to join the military they must have some control over their personal decisions. I feel this can be accomplished in a way that is also helpful to the other solution stated above.

I have already expressed the need to reaffirm the country's dedication to peace through the re-alignment of military aims and means of making warfare. In keeping with this, I am convinced that the best way to defend the domestic United States is not through highly centralized, military bases which can be wiped out with a couple well

placed bombs (although this is the best way to fight a foreign war). I feel a better way would be to distribute self-sufficient localized groups evenly across the country much like a militia. These "county militias", still actually responsible to a centrally located headquarters like the Pentagon, could be more able to defend the country since it would respond to trouble quickly, wherever it occurred.

It would be a source of local pride for a community as its citizens get envolved in the defense of their livelihoods. Because these so called "county militias" would be widespread, persons could transfer from place to place and still be able to participate. Furthermore they would be run efficiently on a sophisticated reserve level enabling people to have outside lives beside their military duties. Such reserve bodies could be located by sources of large

numbers of recruits such as colleges and universities. This would allow people to get an education and serve the country at the same time. Then after several years, being finished with both, they would be ready to settle into civilian life.

On a greater scale this would be an important message to the world I believe, showing that our main purpose, militarily, is defending ourselves and not to enforce our will throughout the world. By eliminating the means of quickly committing the nation to war, we would be making ourselves more trustworthy and would be setting a better example for the world. We would be in a good position to promote disarmament worldwide. In these ways decentralization would prove to be much better for the United States.

My views about the draft and registration closely parallel my opinions about the

military in general. In conclusion it is the disenchantment with the military that is keeping people from joining. Because enough people are not joining the military, leaders have felt that the draft must be re-instituted. If major changes are made in the military to correct these divergencies from public opinion, then some people will probably join. If a critical, creative attitude is taken toward the military to insure that it is working the best that it can while affording people freedom and individuality I believe more people will join. If people can be guaranteed they will be defending our nation and serving a purpose, then more will join. In order to save the all volunteer army system, changes will have to be made. The sooner these changes are made, the better.

Sincerely yours,
/s/
Benjamin H. Sasway

Exh. A

AFFIDAVIT OF CHARLES T. BUMER

State of California)
) ss.
County of San Diego)

COMES NOW CHARLES T. BUMER, affiant herein, and being first duly sworn, deposes and says as follows:

That I am an attorney at law in the state of California.

That I represent Benjamin H. Sasway, who has been indicted on charges of failure to register for the draft.

That on July 24, 1982, Benjamin Sasway wrote a letter to President Jimmy Carter expressing his opposition to the draft registration program.

That on June 30, 1981, in response to a warning letter from the Selective Service System, Benjamin Sasway wrote to the Selective Service System, again stating his opposition to draft registration and enclosing

Exh. A

a copy of his previous letter to President Carter.

That Benjamin Sasway has been a vocal and public opponent of thd draft registration program; that on numerous occasions prior to his indictment, he has made public statements and spoken in public forums to express his moral and philosophical opposition to registration;

That on March 2, 1982, an interview with Benjamin Sasway was published in The Lumberjack, the newspaper at Humboldt State University in northern California; that the article included lengthy quotations from Mr. Sasway in which he expressed his moral and philosophical opposition to draft registration.

That I am informed and believe that Benjamin Sasway appeared on a television news program in Eureka, California, prior to his indictment, and expressed his opposition

to registration and the draft;

That I am informed and believe that Benjamin Sasway participated in a number of public protests and made public speeches against the registration program, including rallies on campus and a protest at his local post office, while a student at Humboldt State University;

That in August, 1981, and December, 1981, Benjamin Sasway attended public meetings of the San Diego Committee Against Registration and the Draft, and made statements to all in attendance concerning his opposition to registration;

That on June 15, 1981, Benjamin Sasway attended a public meeting of the San Diego Peace Resource Center, and made a statement to those present explaining his opposition to registration;

That several issues of the newsletter of the San Diego Committee Against Registration

and the Draft published in 1981 referred to Benjamin Sasway as a San Diego area d draft resister.

/s/
CHARLES T. BUMER

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 2nd DAY OF September, 1982.

/s/ John D. Moran
NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE

(SEAL)

DECLARATION OF RICK JAHNKOW

RICK JAHNKOW declares under penalty of perjury:

That I am acquainted with Benjamin Sasway; that I have worked with him in organizations opposed to registration and the draft; that I am personally familiar with his efforts to protest registration during 1981 and 1982;

That on numerous occasions prior to his indictment, Benjamin Sasway has spoken at public forums and made other public statements expressing his moral and philosophical opposition to draft registration and the draft;

That on March 2, 1982, an interview with Benjamin Sasway was published in The Lumberjack, the newspaper at Humboldt State University in Northern California; that the article included lengthy quotations from Mr. Sasway in which he expressed his moral and philosophical opposition to draft registration;

That I am informed and believe that Benjamin Sasway appeared on a television news program in Eureka, California, prior to his indictment, and expressed his opposition to registration;

That I am informed and believe that Benjamin Sasway participated in a number of public protests against the registration program, including rallies on campus and a protest at his local post office, while a student at Humboldt State University;

That in August, 1981, and December, 1981, Benjamin Sasway attended public meetings of the San Diego Committee against Registration and the Draft, at which I was present, and made statements to those in attendance, explaining his opposition to registration;

That on June 15, 1981, Benjamin Sasway attended a public meeting of the San Diego Peace Resource Center, at which I was present, and made a statement to those present,

explaining his opposition to registration.

That several issues of the newsletter of the San Diego Committee Against Registration and the Draft published in 1981 referred to Benjamin Sasway as a San Diego area draft resister.

Executed on August 9, 1982, at San Diego, California.

/s/
RICK JAHNKOW

Draft registration deadline passes

Resister faces possible fine, prison

"The pioneers of a warless world are the young men who refuse military service."
--Albert Einstein

The deadline for draft-age men to register passed Sunday, and those who failed to register face a possible five-year prison term and a $10,000 fine.

Benjamin Sasway is a Humboldt State University student who has decided to publicly resist the draft by not registering.

"A person has the responsibility to do what he thinks is right," he said. "We have to be true to our own morals.

"I am a public resister, my whole goal is to attack the issue head-on."

Sasway believes the draft system and its penalties for non-registration force people to make choices based on fear rather than

on moral grounds.

"A democracy is based on freedom of moral choice. Without it, people are no longer human beings and become machines."

Sasway said the arguments against the draft are "many, and most are pretty good."

He called the U.S. military a "dictatorship within a democracy" and said, "War over the issues we would fight for now is wrong."

However, he said he would fight to defend his country if a real threat arose.

"I wouldn't make a very good conscientious objector," he said.

Sasway is not alone in failing to register.

Guy Kuttner, draft counselor for Youth Educational Services, estimates the total nationwide is 1.3 million.

According to a Feb. 26 article in the San Francisco Chronicle, 927,504 persons were not registered as of Feb. 23, which is 11.5 percent of those required to register.

Col. Donovan Burton, deputy director of the Selective Services in California, said the number of men not registered prior to the deadline is unknown.

"We'll have those figures in about 30 days," he said in a recent telephone interview.

Burton said recent surveys done by the Selective Service have shown a lot more people going to the post office to register.

"It's doubled to quadrupled in the past few weeks," he said.

According to Selective Service statistics, compliance among 18-year-olds was 72 percent in December and 79 percent in January.

(PHOTO)

Draft Resister Ben Sasway

What the government's response will be now that the deadline is passed is unknown.

"We're in the area of conjecture here," Kuttner said. "I would assume that (the

administration) would be happy to accept anyone" who tries to register after the deadline.

Dick Miller, special agent with the FBI in Eureka, said non-registration is a federal offense and investigation would probably be handled by the bureau.

"In the past, (non-registration) cases were presented to the U.S. Attorney's office," he said in a recent telephone interview. "We (the FBI) are considered the investigative arm of the Justice Department."

However, Miller said he had not yet received any guidelines from the Department of Justice and did not know how the bureau would respond to the situation.

"We haven't had any active cases since the Vietnam era," he said.

Kuttner said there are approximately 40,000 federal cases a year, and it would be "logistically impossible, regardless of

the Reagan administration's intent" to prosecute every non-registrant.

Miller, Burton and Kuttner all agree the aim of the administration is one of compliance rather than prosecution.

Kuttner believes persons who did not register will receive a number of notices to give them an opportunity to comply.

"The obvious intent is to get people to register.

Miller agreed and said he did not think there would be any immediate arrests.

Burton said, "We encourage the young men to come forward and register."

Sasway, however, does not intend to comply to the government's registration requirement.

"Draft registration is a symbol of the draft -- we have to fight the spirit," he said.

Sasway believes resistance of draft

registration is "the only way we can keep from being immersed in another senseless war."

"Deep down in our minds, Vietnam is still there -- we don't want our lives to be ruined by that sort of thing," he said.

Kuttner said as a draft counselor he does not encourage anyone to resist registration, but "registration is a good time for resistance."

He said when he was young no one thought twice about registering for the draft.

"We had second thoughts when they started shipping people off to Vietnam, and they (soldiers) started coming back in bags," Kuttner said.

Kuttner said one option the government might take to increase compliance to registration is by holding 40 to 50 "showcase trials" to set an example.

"These people are not chosen at random,"

he said. They would be the public resisters.

U.S. Attorney General William French Smith has been quoted as saying, "There certainly will be hundreds" of trials.

Burton said he could not say for sure, but such trials "certainly are a possibility."

Sasway said, "I certainly don't want to go to jail, but obviously I will.

"There's a chance I may have to do all five years. It's a scary thought: I'm scared to death of it," he said.

Sasway, however, said he has no doubts that he is right in not registering, despite the possible penalties.

"I refuse to respond to fear -- that's wrong," he said.

Sasway said his parents are "generally supportive but terrified" of his stance.

"I have a $10 bet with my dad," Sasway said. His father believes the government will try to quietly seek compliance rather

than prosecute, he said.

"They (the administration) are not looking for an out, they're serious," Sasway said.

Burton, however, said registration is not a prelude to the draft and it only makes it easier for young men to come to the country's aid "in its time of need."

But Sasway believes that by resisting, "I am defending my country in its time of need."

EXHIBIT B

A F F I D A V I T

STATE OF VIRGINIA AT LARGE

This day appeared before me, Geraldine H. Wamsley, a Notary Public, in and for the the State of Virginia at Large, Arthur P. Strickland, who stated the following:

1. I represent Enten Eller who has been charged by Indictment dated July 13, 1982, in the United States District court for the Western District of Virginia, with a violation of Title 50 United States Code, Appendix, Sections 453 and 462(a).

2. Mr. Eller is a college student at Bridgewater College in the Western District of Virginia and at the time he was required to register for the draft he wrote letters to the Selective Service System, the United States Attorney for the Western District of Virginia, the United States Attorney for the

Central District of California, Honorable Jim Lloyd, Congressman for the 35th District of California, advising these people that as a matter of conscience he could not register for the military draft.

3. Mr.Eller corresponded with the aforementioned people and in so doing made himself particularly visible as a person who would not, as a matter of conscience, submit to the draft registration.

4. In view of the fact that Mr. Eller is the only person who has been indicted in the Western District of Virginia for violating the draft registration statute, it is my opinion that he was signaled out for prosecution because of his forthright and public refusal to register for the draft.

/s/
Arthur P. Strickland

Subscribed and sworn to before me this 3rd day of August 1982.

/s/
Notary Public

My Commission expires: July 9, 1983

(RECEIPT FOR CERTIFIED MAIL)
No. 243763
Dated Aug. 5 1980

Enten Eller
2448 3rd Street
La Verne, CA 91750
- or after September 5-
Box 552, Bridgewater
College
Bridgewater, VA 22812
August 4, 1980

The Honorable Jim Lloyd
227 Cannon House Office Building
Washington, DC 20515

Dear Mr. Lloyd:

As you are my representative in Congress, I feel led to write you and inform you of my thoughts and feelings on war, the draft, and more specifically, registration.

Although I am still 18 years old, I was born in 1961, which means that the time designated for me to registr with the Selective Service was last week, beginning with Monday, July 28. Today is Monday, August 4, and I have not registered for the draft and do not intend to do so.

Before I go into my reasons as to why, I would like to assure you that I realize if not all, then a good deal of the consequences of that action. If I was trying to hide I would not be writing you, and so I intend to accept the full consequences of not registering. The obvious consequences are $10,000 fine and up to 5 years in prison. Not so apparent are things like an interruption of my education, loss of my right to vote, a prison record which could and most probably will interfer (sic) with any job for which I might apply, loss of friends and acquaintances and respect. . .to say nothing of what prison may be like. I feel I understand these things, and I still choose no (sic) to register.

Why? That is a big question, but not so hard to answer. I am not trying to oppose the United States government, nor am I attempting to cause problems for the Selective

Service. Simply, I cannot conscientiously register for the draft. I feel that God has called me to not register. Therefore, I will not register. True, as a Christian, I am called to obey my government at all times that to do so would not conflict with my following God and Christ Jesus. (I Peter 2:13-17, Romans 13:1, 5-8) However, registration for the draft for me has fallen into the area of conflict, and my belief is that when God and the government conflict, God must be obeyed. This makes sense, for in my belief God is a higher authority than any worldly institution, even the church. Although I am a member of the Church of the Brethren and have been attending there all my life (for my father is an ordained minister in the church), the Church of the Brethren does not advocate resistance to registration per se. The Church has historically opposed the draft and participation

in military activities, and has stood against any and every war, but recommends that young men draw the line at the draft and declare themselves conscientious objectors, and perhaps serve in alternative service. I myself believe that God has called me to take a stand at a more extreme position.

On this point of alternative service I'd like to declare that I would not object to serving in that manner. I am proud to be an American! Sure, the United States isn't perfect, but it is evident to me that we do just as well if not a great deal better than any other nation of which I know! In fact, I feel that I owe this country a lot. I recently traveled abroad to Australia and that helped me realize even more waht (sic) America means to me. I would be glad to use my God-given talents to benefit the United States by working for Uncle Sam for two years or even more. However, to fulfill my obligation

to God, any service I do must be constructively for all peoples on this earth. . . which obviously excludes the military or any of its support services. I say support services because I believe that whether you shoot someone, or you order someone else to shoot someone, or whether you make the gun that shoots the person, etc., you are still guilty in the sight of God.

Before I close, I would like to stress that I am not a religious fanatic or anything of the sort. I am a college student majoring in physics and math that just happens to take my faith and belief in God seriously. I have no wish to break any law nor cause any problems for my government, but I wish to follow where my Lord leads me. I thank you for the time that you have already spent in reading this letter. I am proud to have a representative like yourself in Congress. I look forward to your

reply, and would eagerly accept the opportunity to meet you in person once again. (I was a member of the Bonita High School Chamber Singers you heard in 1976) If you are not planning on being in California this August, if I am still able I will be returning to Briegewater, Virginia for college around the beginning of September. Bridgewater, near Harrisonburg, is a scant 100 miles from Washington, D.C., and I would enjoy the discussion if you could fit me in your busy schedule. Once again, thank you.

Yours in Christ,

/s/

Enten Eller

Exh. C to Appendix E

Reprint of July 20, 1980 San Jose

Mercury News Article

ang pacifist makes his stand

Non-cooperation is his

Most seer

BEST AVAILABLE COPY

State of California)
) SS.
County of Los Angeles)

David A. Wayte, being first duly sworn, deposes and says:

I have been a public non-registrant from the date President Carter requested Congress to approve the resumption of draft registration in January, 1980. I have made numerous speeches and public appearances since January, 1980, during which I openly expressed my opposition to the draft and announced that I would never register for the draft.

I have appeared on many radio and television programs to announce my opposition to the draft and my determination not to regis- rwe. I have written to President Carter, during his administration, and to President Reagan, during his administration, to express my opinion concerning the draft and my decision not to register. I have also

written a similar letter to the Selective Service System.

I believe I am being prosecuted because I exercised my First Amendment rights and embarrassed the Government by my outspoken criticism of the draft.

Dated this 12th day of August 1982 at Los Angeles, California.

/s/
David A. Wayte

Subscribed and Sworn to
Before me this 12th day
of August 1982 (SEAL)

/s/
William G. Smith
Notary Public
State of California
County of Los Angeles

ASO:RLR:RRR:cj
(213) (88-2423

United States Attorney
Central District of
California

REGISTERED

RETURN RECEIPT
REQUESTED

United States Courthouse
312 North Spring Street
Los Angeles, California
90012

October 15, 1981

Mr. David Wayte
475 Alpine Street
Pasadena, California 91106

Re: Registration for Selective Service

Dear Mr. Wayte:

We have been advised that you are required to register with the Selective Service under the provisions of the Military Selective Service Act, and that you have not yet registered. If a person is convicted of violating this Act, he may be imprisoned for five years or fined $10,000, or both.

You should note that your case has been referred to the Federal Bureau of Investigation

and to the Office of the United States Attorney for the Central District of California.

Regarding registration, I am enclosing a special registration form prepared by the Selective Service. Fill out the form and mail it in the enclosed envelope to the Selective Service system. If you fail to register within three weeks, your case will be considered for prosecution.

Sincerely,

ANDREA SHERIDAN ORDIN
United States Attorney

/s/
RICHARD R. ROMERO
Assistant United States Attorney
Deputy Chief, Criminal Complaints Section

Enclosures

cc: Lawrence Lippe, Chief
General Litigation and Legal Advise Section
U.S. Department of Justice
Post Office Box 887, Ben Franklin Station
Washington, D.C. 20044

Exh. C

Selective Service System
600 E. Street NW
Washington, D.C. 20435

August 4, 1980

Dear Selective Service System:

I have not registered for the draft. I plan never to register. I realize the possible consequences of my action, and I accept them.

I promise myself not to cooperate with you in any way which will aid the United States military. I promise you that I will be honest and straightforward about my position.

I address you as a system, not as individuals. I wish you didn't exist.

Sincerely

/s/

David Wayte (born 12/19/80)
Student, Yale University

Temporary Address: 219 Walnut Ave. Santa Cruz, Ca 95060 (408) 426-4551

Permanent Address: 475 Alpine St., Pasadena Ca 91106 (213) 795-0774

Exh. C

President Carter
The White House
Washington, D.C. 20500 August 4, 1980

Dear Mr. Carter:

I am writing you about a decision I wish I had never been forced to make. It was perhaps the most important decision of my life. one which will most likely influence all my future actions. That was the decision to consciously and wilfully break a law of my country.

I love my country. I believe that its Constitution is close to perfect, its laws the most just in the world. That is why it pains me deeply when a law is enacted which contradicts the basic tenets of freedom and democracy upon which my country was founded. You enacted such a law when you signed the draft registration bill.

By signing the bill, you told me to make

myself available for a system which I consider murderous and immoral. You wanted to make me part of your national defense, a defense which can only provoke a world-devastating war. And you applied the threat of imprisonment to coerce me into it.

I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me.

This was a big decision to make. You forced about four million other young men to make the same choice, and I know that a vast number of them chose the route of non-cooperation and resistance as I did. I will now spend a large part of my time leading others to that route until your draft

registration law is repealed.

Please don't ask me to turn against my country any longer.

Sincerely,

/s/

David Wayte (born 12/19/80)
Student, Yale University

Temporary Address: 219 Walnut Ave., Santa Cruz, Ca 95060 (408) 426-4551

Permanent Address: 475 Alpine St. Pasadena, Ca 91106 (213) 795-0774

STATEMENT OF RESISTANCE

Although I was required by law to register for the draft last summer, I did not register, and plan never to do so. At that time I wrote to the Selective Service System, informing it of my resistance, but thus far I have received no reply, much less any hint of prosecution.

Draft registration is only one particular manifestation of a larger system established to protect business interests and national security and intended to suppress individual self-expression and to stifle cooperative efforts for peaceful social change. This system has connections to United States interference with foreign governments, including military and financial support of repressive Third World dictatorships, to poisonous and self-destructive energy interests such as synthetic fuel and nuclear

power, and to the continuation of the diseases, such as racism, sexism, and poverty, which plague our nation, condemning it to a chronic state of weakness and instability.

The nuclear arms race taking place today makes more obvious the absurdity of trying to defend oneself militarily against war. Such defense only contributes to the power of fear which reigns supreme in our world and only makes inevitable the devastation which awaits us. We must learn before it is too late that strength lies in self-restraint rather than in aggression, that peace is won by love but not through war, and that life exists in self-sacrifice rather than in self-preservation.

Discriminating on the basis of age and sex, draft registration singles us out for participation in a mechanism of war. It makes us available to kill another person because

of his nationality, and places us on the front lines as warriors and puppets of greed. On the other hand, registration also provides us an opportunity to say "no", to voice our opposition to a system of oppression, and to commit ourselves to the cause of peace.

Governments use the tool of rear (sic) to round up their potential draftees. By threat of a felony conviction and possible imprisonment, pressured by our families and concerned about our own careers, we are coerced at a vulnerable age to sign our names and our lives over to the military. This coercion, in turn, perpetuates the deep, internal cycle of cynicism and impotence which erodes the character of our generation and numbs us to the violence and injustice done both to ourselves and to others throughout the world.

We must put an end to this cycle of fear and act, for once, out of strength rather than intimisation. (sic) The temptation to compromise one's principles by choosing the easiest and most pragmatic route is very strong in this society. By registering despite our own conscience and will, thinking that we can escape induction through legal conscientious objector status, medical deferments, or by resisting at a later stage when the draft itself is enacted, we only squelch the voice of dissent within ourselves and delay as well as complicate our inevitable choice between war and peace.

The draft affects us all. Don't register.

David Wayte

Temporary Address: 90 Austin st. New Haven, Ct 06515 (203) 389-9773

Permanent Address: 475 Alpine st. Pasadena, Ca 91106 (213) 795-0774

Exh. C

August 10, 1980

To whom it may concern:

I am writing to inform you that I have violated the Military Selective Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.

I believe that war in any form is wrong. Christ meant for Christians to love each other and to love their enemies. War is an expression of hatred and an institution that has legalized and encouraged types of violent conduct that no civilized country would allow within its borders during peacetime. The use of force to resolve disputes has created an atmosphere of coercion which directly conflicts with the message of love preached by Christ. A Christian must use truth, love, understanding, and quality to resolve any disputes in which he is involved.

Exh. D

As a Christian, I feel that I must avoid participation in the conscription process by not registering because conscription is an inherent part of the war process.

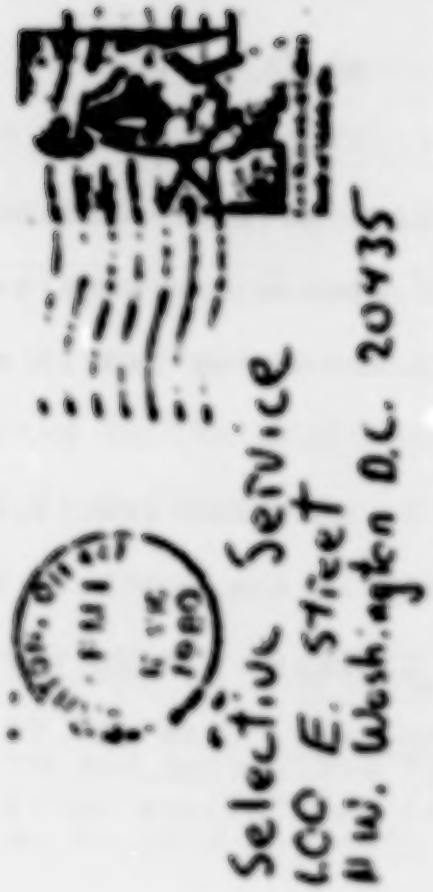
At this point, I feel that I should emphasize that I am not anti-American. I consider myself privileged to live in a country were basic human rights, self-government, and religious freedom are granted to the citizens. I am not opposed to serving this great land of ours by working in a hospital, teaching, or by serving in some other type of public service job. However, I can not participate, in any manner, with the armed forces.

Sincerely

/s/

Mark Schmucker

Exh. D



Exh. D

BEST AVAILABLE COPY

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF SUMMIT)

EILZABETH REILLY, affiant herein, being first duly sworn, deposes and says as follows:

That I am an attorney at law in the State of Ohio.

That WILLIAM T. WHITAKER and, I represent MARK SCHMUCKER in the Northern District of Ohio, Eastern Division, in United States v. Mark Arden Schmucker, Case No. CR 82-133A, upon an indictment for failure to register for the draft;

That on or about August 10, 1980, MARK SCHMUCKER wrote to the Selective Service System, expressing his opposition to the draft and to the registration program, and outlining his reasons and beliefs in opposition, and expressing his refusal to participate as a registrant;

Exh. D

That MARK SCHMUCKER has been public and vocal in his opposition to the draft, was a member of a group at Goshen College, Indiana, opposed to the draft registration program, wrote articles for publication in opposition to the program, and that MARK SCHMUCKER has frequently expressed his strong religious objections to the draft and to registration publicly and vocally

/s/
ELIZABETH REILLY

Sworn and subscribed by ELIZABETH REILLY before me on this eleventh day of August, 1982.

/s/
NOTARY PUBLIC
SHAWN HEADLY

My commission expires
May 18, 1986

Exh. D

AFFIDAVIT

STATE OF CONNECTICUT)
) ss. Aug. 13, 1982
COUNTY OF FAIRFIELD)

COMES NOW RUSSELL FORD, Affiant herein, and being first duly sworn, desposes and says as follows:

That I have been indicted in New Haven, Connecticut, on a charge of failure to register for the draft.

That in November of 1981, I wrote to President Reagan, to the Attorney General of the United States, to Casper Weinberger, to the Selective Service System, and to my Congressional representatives, to express my opposition to the draft registration program.

That I have been a vocal and public opponent of the draft registration program; that I have spoken at public forums and meetings to express this opposition to

registration; that I have appeared on NBC news in Washington, D.C., to state my opposition to registration; that I have written articles opposing draft registration, including an article in the school newspaper at Wesleyan University.

/s/
RUSSELL FORD

Subscribed and sworn to before me on Aug. 13, 1982.

T. Stevens Bliss
Commissioner, Superior Court

Russell Ford
November 29, 1981

Ronald Reagan, President of the United States of America
Thomas K. Turnage, Director Selective Service System
Caspar W. Weinberger, Secretary of War
William French Smith, Attorney General
Sam Gejdenson, Connecticut Representative in Congress
Christopher Dodd, United States Senator from Connecticut
Lowell Weicker, United States Senator from Connecticut

Friends:

I am writing to inform you that although legally required to do so I have failed to register with the Selective Service System. I have counselled others to refuse registration, and I shall continue to urge resistance to all war and to all preparation for war.

It has always been young men such as myself who have done the killing and the dirty work that the government leaders have directed. It could have been me who nailed Jesus to the cross, who ran the ovens at Dachau, who bombed Dresden, and then Hiroshima.

It is men like me all over the world who are training to kill, to die, at the order of their governments.

You claim to want peace, as do the governments and armies of Russia, of Israel, of the Palestinians, of the West- and the East-Germans; and yet you would have me march to kill not only the soldiers but the women and the old men and the children - children laughing and crying and growing up some of them to be soldiers themselves. It is the tragedy and the joke of your wars that we go to rape and burn in the 'enemy' country those who we would protect in our own homes.

You ask sometimes if I would have fought Hitler, but nobody fought Hitler. The soldiers killed each other in a thousand battles and they burned each other's cities so there was no one to come home to and I have never heard that a single bomb was ever used to

stop the trains into Auschwitz. Six million rode those trains and died, killed by executioners only following orders. But of the people running the trains, working in kitchens and factories, paying taxes, who ever stopped to ask "why"? Nobody on either side fought Hitler - they only followed orders.

I say "enough"! I refuse to kill. I Will not cooperate with you in your murderous business from which some profit while others die. I will not compete with you in violence by turning guns and threats of destruction against you. I am an anarchist and a pacifist and I think little good can ever come of your order; and your wars - beliefs I hold as a free person but which it is not 'legal' to act upon.

I am not trying to tear down or overthrow the political system of the United States. I am trying to live my life in harmony with my spiritual, ethical, and political

beliefs - to act out of my love, respect, and responsibility for humanity and the living planet which is my home. I regret that this has brought me in conflict with the government of my country, but I cannot comply with the dictates of that government while still seeking to serve the cause of life on earth.

Should you wish to contact me I can be reached through the address below.

For the generations yet unborn,

Russell F. Ford

69 High Street (Ecology House)
Middletown, Connecticut 06457
(203) 347-4048

JOINT STATEMENT

Friday September 10, 1982

"The word 'registration' to young people is code for 'draft', an idea that evokes painful memories of Vietnam for many and an idea that has always seemed alien in a democratic society."

- Ronald Reagan, 1979

"...perhaps the most fundamental objection to draft registration is moral. Only in the most severe national emergency does the government have a claim to the mandatory service of its young people. In any other time, the draft or draft registration destroys the very values that our society is committed to defending."

-Ronald Reagan,

on the campaign trail, 1980

"My feeling is that felony prosecutions at

this time may have an awful lot to do with the anti-nuclear movement. I think we ought to proceed really cautiously on this particular point. This would be a real rallying point. I am not in principle against felony prosecutions for this. ...I think the cases should be quiet; and pick the right jurisdiction so you don't end up in New York or Chicago, and end up in Omaha or somewhere like that for your first few trials."

-John Herrington, assistant sectary of the Navy for manpower speaking during a Reagan administration strategy session on April 12, 1982

We six young men who were able to be here today are only a few among thousands of Iowans who have refused to comply with this unconstitutional and totally unjust law. Like the hundreds of thousands of young non-registrants across the country we are motivated by a variety of moral, religious, philosophical, and political beliefs.

We do, however, share a conviction that the youth, the parents, and others in this country will not stand for the further Vietnamization of Central America.

This first step toward a return to active conscription is a complete failure. Our "crime" is not not having registered - over a million people have not registered, our "crime" is having spoken out publicly on the subject. Our "crime" is not what we have done, but what we have said.

There is no intention to prosecute all of us; their intent is simply to put a few of us on highly publicized show trials in an attempt to intimidate seventeen and eighteen year old children into violating their moral and religious beliefs out of fear.

Some of us may well have to go to jail - if so, we shall join our brothers and sisters in prisons in South Africa, in Argentina, in the Soviet Union and other countries around

the world for refusing to be drafted to fight whatever wars their governments may currently be waging.

Nuremburg stated once and for all that final responsibility for moral decisions lies with the individual and not with their government. We firmly believe this.

Gary Eklund
/s/

Jeff Hall
/s/

Rusty Martin
/s/

Kevin Phillips
/s/

Russ Simmons
/s/

Mike Sprong

AFFIDAVIT OF GILLAM KERLEY

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

COMES NOW GILLAM KERLEY, Affiant herein, and being first duly sworn, deposes and says as follows:

That in September of 1981 I wrote to the Selective Service System, expressing my opposition to the draft registration program; that I sent a copy of this letter to my representative in Congress;

That on December 28, 1981, in response to a letter from the Selective Service System, again expressing my opposition to the draft registration program; that I sent a copy of this letter to my representative in Congress; that copies of this letter were sent to a number of local and national anti-draft organizations; that the letter was published in The Peacemaker and Reistance News,

Exh. G

alternative newspapers with national circulation;

That I have been active in public organizations opposed to registration and the draft, including the Madison Committee Against Registration and the Draft, the Committee to Stop Militarism and the Draft, and the Madison Draft Pssistance Coalition; that I was one of the chairpersons of the first meeting of the Madison Draft Resistance Coalition;

That during the summer of 1980 I personally distributed statements which I had written, explaining my opposition to the draft registration program;

That in July of 1980 I was interviewed on WORT, a local radio station, and stated my opposition to registration;

That I have written articles opposing draft registration in Free For All, an alternative newspaper, and in The Daily Cardinal,

Exh. G

a student newspaper at the University of Wisconsin at Madison;

That following the indictment of Benjamin Sasway I spoke at a rally and press conference held to protest his indictment, and again stated my opposition to registration; that this statement was printed in several local newspapers and aired on radio and television news programs;

That in July of 1982 I was visited by agents of the Federal Bureau of Investigation;

That on July 6, 1982, I received a letter from the United States Attorney in the Western District of Wisconsin, warning me that I may be prosecuted for failure to register for the draft.

/s/
GILLIAM KERLEY

Subscribed and sworn to before me
this 13th day of August, 1982.

NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE
My commission expires 11-13-83.

225 Lakelawn Place
Madison, WI 53703
(608) 251-3463
September 1, 1981

Director
Selective Service System
Washington, DC 20435

Good morning.

Last summer, when draft registration was reinstituted, I was deeply concerned by the apparent trend of the Carter administration toward a warlike foreign policy. I am even more disturbed by the Reagan administration's actions which border onopen (sic) provocations for war with other nations.

During July 1981, I reached a decision not to register for the draft. I never made a secret of that fact; indeed, I discussed my reasons for non-compliance on a radio talk show and distributed leaflets explaining my decision.

My position then, as today, was that the

return of registration was, at best, a crude political ploy by then-President Jimmy Carter to win re-election, and, at worst, a major step on the path to a suicidal nuclear war.

I was forced by my conscience to speak out, and to publicly refuse to cooperate in any way with this dangerous and morally reprehensible decision by the government. My loyalty belongs not to Jimmy Carter or Ronald Reagan, but to the principles of freedom, democracy, and peace. While recognizing the risks inherent in my decision, I believe that the alternative--allowing the government's trend toward war to go unopposed--is far more dangerous.

I am once again compelled to speak out--this time against the selective prosecution of a few of my brothers who made the same choice as I did. To prosecute anyone for an act of conscience is a violation of fundamental

human rights; to prosecute a select few as examples is blatantly un-Constitutional.

It is my sincere hope that the government will reconsider its position on both registration for a draft and the selective prosecution which has ensued.

Sincerely yours,

/s/

William Kerley

cc: Rep. Robert Kastenmeier

CONGRESS OF THE UNITED STATES

House of Representatives

Washington, D.C. 10515

September 8, 1981

Mr. Gillam Kerley
225 Lakelawn Place
Madison, Wisconsin 53703

Dear Mr. Kerley:

I appreciated your thoughtfulness in sending me a copy of your letter to the Director of the Selective Service System regarding your refusal to register for the military draft.

As you may know, I am opposed to peacetime military conscription, and I voted against providing funds to permit registration for the draft to begin last year. I shall continue to object to registration and peacetime conscription.

With kind regards.

Sincerely

/s/
ROBERT W. KASTENMEIER
Member of Congress

RWK:ads

Exh. G

SELECTIVE SERVICE SYSTEM
National Headquarters/Washington, D.C.
20435

December 4, 1981

Mr. Gillam Kerley
225 Lakelawn Place
Madison, WI 53703

Dear Mr. Kerley:

We have received information that you may be required to register with Selective Service under provision of the Military Selective Service Act, but a check of our records indicates that you have not registered. The purpose of this letter is to check the accuracy of this information. Please understand that we are required by law to refer possible violators of the Military Selective Service Act to the Department of Justice. If a person is convicted of violation of the Act he may be imprisoned for not more than five years or fined not more than $10,000 or both.

Generally, a male who is not already in

Exh. G

the active Armed Forces is required to register with Selective Service if he was born in 1960, 1961 or 1962, or if born in 1963 or a later year, within 30 days of his eighteenth (18) birthday. If a person required to register fails to do so because of "some condition beyond his control" he must be able to prove that the "condition not under his control" prevented him from registering. If the "condition" changes he has 30 days to register. Generally, being in prison or confined in a hospital or institution qualifies as a "condition beyond his control."

In order for us to clear our records, and not forward your name to the Department of Justice for investigation by the Federal Bureau of Investigation you must take one of the following actions:

- o If, as described above, you are required to register and have not

already done so, please fill in the enclosed form and mail it to Selective Service in the enclosed envelope.

- o If, as described above, you are required to register but have not already done so because of a continuing "condition beyond your control", please indicate in a letter mailed in the enclosed envelope your reason for your continued non-registration.
- o If, as described above, you are required to register and believe that you have registered, please send us a copy of your Registration Acknowledgement letter (SSS Form 3) or provide us ayour Selective Service number in the enclosed envelope.
- o If, as described above, you do not believe you are required to register please explain why you feel you do not have to register and provide

proof of your status in the enclosed envelope. Proof will vary from case to case but may be a copy of your birth certificate, a DD Form 53 or similar form showing your active duty status in the military, a statement, in English, from the diplomatic agency of the country of which you are a subject explaining why you are not required to register, or other document which supports your claim.

Please note that sending false information in response to this letter may be a violation of the Military Selective Service Act and may subject the sender to the penalties described above.

Let me stress that unless we hear from you within 15 days of the date of this letter we will send your name to the Department of Justice for Investigation and possible prosecution. If you have registered or if you are a person who is not required to

register we are sorry for any inconvenience this letter may cause you and we appreciate your help in clearing our records.

Sincerely

/s/

Henry N. Williams
General Counsel

PEACE ON EARTH

225 Lakelawn Place
Madison, WI 53703
28 December 1981

Henry N. Williams
General Counsel
Selective Service System
National Headquarters
Washington, DC 20435

Dear Mr. Williams:

I have not registered with the Selective Service System because of a "condition beyond my control."

That condition is a nuclear arms race which poses a very serious threat to the very existence of the human race. The United States has always set the pace for the arms race, and appears to be rushing headlong toward a showdown with the Soviet Union involving the use of nuclear weapons. When both superpowers possess far more weapons that would be required to destroy this planet, the results of such a showdown would

be the end of our civilization.

The arms race, besides posing a threat to the human race, seriously endangers this country's economic stability. Military spending is the most inflationary type of government. We as American citizens pay the price of the arms race, and the poor, from whom the Reagan administration has taken vital services to pay for an expended military budget, pay the highest price. There is also an environmental price for the arms race. Nuclear weapons require mining of radioactive ores and storage of hazardous waste materials, both of which present environmental dangers.

There are other factors involved in my refusal to register. One is the foreign policy of the United States, which is based on support for oppressive dictatorships and military intervention in sovereign nations

around the world. Another is the growing influence of the military in every phase of civilian life--the militarization of our entire society. These are also "conditions beyond my control."

The Reagan administration has exhibited an unprecedented propensity for saber-rattling, threatening to use military action against any number of Third World countries. Such intervention would under ordinary circumstances be an immoral and unjustified attack on the rights of scvereign nations. When both the United States and the Soviet Union possess a tremendous amount of nuclear overkill capability, these threats become far more grave. Escalation of a Third World conflict into nuclear war is increasingly likely, and will result in the final holocaust.

The militarization of our society is less easy to define, but it can be seen, for

instance, on university campuses, where professors are finding that, due to reductions in all funding for basic research except that provided from the military, they must sent (sic) grant proposals to the Pentagon. The shift in funding sources means that they must tailor their research interests, their attitudes, and their thinking to meet the needs of the military, rather than human needs.

To have registered for the draft in July 1980 would have been lending my tacit approval to these very dangerous trends in our nation. The draft would mean a large army, an increased ability to send more troops around the globe, and a good chance of U.S. involvement in a military conflict. At the time that former President Jimmy Carter proposed the resumption of registration, it was meant as an implied threat to

nations around the world. It was a threat I find offensive and bullyish.

I had no moral choice save to refuse to register for the draft as an act of civil disobedience; my conscience would not have allowed otherwise. To have waited for conscientious objector status to be offered or to have simply silently not registered would merely have exempted me from the process; my goal is instead to stop the process of registration, draft, and war, for everyone.

Please do not construe this as a lack of patriotism on my part. True patriotism is not unthinking obedience to leaders; it is obedience to one's conscience and principles, toward the goal of improving the nation. As I wrote at the time of my decision, "my loyalty is not to Jimmy Carter; it is to freedom, democracy, and peace." Registration and the draft are incompatible with these

principles; they represent enslavement, loss of power over our own lives, and the inevitability of a suicidal nuclear war.

Henry David Thoreau expressed it another way. The greatest patriots, he said, "serve the state with their consciences...and so necessarily resist it for the most part; and they are commonly treated by it as enemies." It was, and is, my duty to disobey.

I am proud to be among the one million American men who refused to register. I only hope that the United States government will take notice of our objections and begin the demilitarization of our society, the dismantling of our worldwide military forces, and the implementation of universal disarmament.

For peace,

/s/

Gillam Kerley

PEACE ON EARTH

306 North Brooks Street
Madison, Wisconsin 53715
16 February 1982

Rep. Robert Kastenmeier
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Kastenmeier:

Last September, I sent you a copy of a letter I wrote to Selective Service System explaining my reasons for not registering for the draft and expressing my objections (on moral and constitutional grounds) to selective prosecution.

The System responded with what I presume is the standard form letter ("We have received information that you may be required to register...") instructing me to register or explain why I am not required to do so. That letter was dated December 4, 1981.

My response (a copy of which is enclosed) to the System explained that I had not

registered due to a "condition beyond my control" as allowed by the Military Selective Service Act. The "condition" I cited was the insanity of the nuclear arms race and the U.S. government's tendency toward intervention in sovereign nations around the world.

I appreciate your opposition to registration and peacetime conscription, and would urge you to take a public stand in support of resistance to the Selective Service System. Your district includes a large number of men who have refused to register for the draft. One of those men, Michael McMillen (who just moved from LaCrosse to Madison), has received a letter from U.S. Attorney John Byrnes notifying him that prosecution would begin if he did not register by February 28. He was among the original 161 persons who received letters from the System.

The success of his challenge to the system will be enhanced by the willingness of community leaders like yourself to endorse him in his resistance. I strongly urge you to do so, and would be most interested in discussing this matter in detail with you at your convenience.

For peace.

/s/

Gillam Kerley

Exh. C

CONTRESS OF THE UNITED STATES

House of Representatives

Washington, D.C. 20515

March 12, 1982

Mr. Gillam Kerley
306 North Brooks Street
Madison, Wisconsin 53715

Dear Mr. Kerley:

I appreciate hearing from you once again regarding your objections to registration for the military draft, and I can sympathize with your views.

As a United States Congressman who has taken an oath to uphold the laws of the United States, I cannot urge resistance to an official act of the U.S. Government. As you know, I do not support registration and I have voted against providing the Selective Service System with funds to carry out registration. But because of my position, I cannot recommend that citizens violate the law.

Exh. C

During the Vietnam war period, I strongly opposed our involvement in that conflict, and I voted against providing funds for our involvement and I voted against extend- the draft. But, although I believed the war to be wrong, I could not urge people to violate the law and avoid the draft. Each individual has to allow the dictates of his own conscience to determine whether or not he will abide by the law. I respect the judgment of those, who on moral or religious grounds, refused to register or appear for an induction notice for the draft during the Vietnam period. Some fled our country. Others did serve prison sentences. I can understand the feeling today about registration. I believe that registration must be ended, and I will continue to work in the Congress to accomplish this. Registration serves no useful purpose and it is again causing divisions within our nation which we do not need.

With kind regards.

Sincerely

/s/

ROBERT W. KASTENMEIER
Member of Congress

RWK:mls

PEACE ON EARTH

306 North Brooks Street
Madison, Wisconsin 53715
Formerly: 225 Lakelawn
Place
Madison,
Wisconsin 53703

8 March 1982

Henry N. Williams
General Counsel
Selective Service System
National Headquarters
Washington, DC 20435

Dear Mr. Williams:

The official "grace period" for those who have not registered for the draft has come and gone. My status as a non-registrant remains unchanged.

The imminent threat of U.S. intervention abroad, the militarization of American Society, and the suicidal nuclear arms race all constitute "conditions beyond my control" which prevent me from complying with the Military Selective Service Act.

Exh. G

I stand by the statements which I made in my letter to the Director of the Selective Service System dated 1 September 1981 and my letter to you dated 28 December 1981.

I cannot in conscience lend tacit approval to the process of registration, conscription, and war through my participation in the Selective Service System.

I hope that the U.S. government will take notice of my sentiments and begin the demilitarization of our society, the dismantling of our worldwide military forces, and the implementation of universal disarmament.

For peace,

/s/

Gillam Kerley

Exh. G

A DECLARATION

I, Michael J. McMillan, declare under penalty of perjury, that I have made public my refusal to register with the Selective Service System, as described below.

On July 21, 1980, I was present at a press conference held in front of the U.S. Post Office in LaCrosse, Wisconsin. At the press conference I announced to local media my opposition to the draft registration program, and made clear my refusal to register.

On June 2, 1981, I wrote a letter to Bernard Rostker, then Director of Selective Service (letter attached, labeled Exhibit A), to explain some of my objections to the registration program, and to reaffirm my refusal to register.

On June 17, 1981 I received a letter from Henry N.Williams, General Counsel for Selective Service (letter attached, labeled Exhibit B), informing me that if I did not

register within 15 days, my name would be forwarded to the Department of Justice "for investigation and possible prosecution".

On June 23, 1981, I responded to Henry Williams by letter (attached as Exhibit C), in which I notified him of the letter which I had sent to Bernard Rostker (see Exhibit A), enclosing a copy for his reference.

On October 1, 1981, I wrote a letter (attached as Exhibit D), which I sent to David Kline, of the General Litigation Section of the Criminal Division, U.S. Justice Department, Washington, D.C. In the letter I explained that I was a public nonregistrant, and explained some of my objections to the registration program. I also sent a copy of that letter to John Byrnes, U.S. Attorney for the Western district of Wisconsin.

On February 3, 1982, I received a letter (attached as Exhibit E) from John Byrnes, in which he notified me that if I did not

register by February 28, 1982, his office would initiate criminal prosecution against me.

On March 6,1982, I spoke at an anti-draft rally held on the steps of the Wisconsin State Capitol in Madison, Wi.

During the week of March 8, 1982, I hand-delivered a transcript (attached as Exhibit F) of the statement I made at the March 6 rally.

On July 1, 1982, a press conference was held in Madison, at which I responded to the indictment of Benjamin Sasway, and reaffirmed by refusal to register. During the press conference, I received word that two agents from the Federal Bureau of Investigation had just visited my home. Later that same day, I met with F.B.I. special agents, Allan Thompson and Thomas Marquardt in the United States Marshals Service in Madison. They interviewed me regarding my refusal to

register (copy of transcript of Thomas Marquardt's notes from the interview attached, labeled as Exhibit G).

During the period of time from July 1980 to September 8, 1982, when I was indicted for refusal to register, I have made public my opposition to the registration program and my refusal to register, as described above. In addition, but not limited to, I have publicly announced my refusal to register in other ways, briefly described as follows:

--radio shows

--additional press conferences

--rallies

--public draft forums

--TV talk shows.

I believe that these public statements regarding my opposition to the registration program and my refusal to register are directly responsible for my prosecution by

the U.S. government.

/s/

Michael J. McMillian
October 12, 1982

MJM:tjs
Enclosures

Exh. H

AFFIDAVIT OF CHARLES EPP

STATE OF KANSAS)
) ss.
COUNTY OF Harvey)

COMES NOW CHARLES EPP, Affiant herein, and being first duly sworn, deposes and says as follows:

That in early 1981 I wrote to the Selective Service System, expressing my deep religious and moral opposition to the draft registration program; that I sent the same letter to President Reagan and to one of my Senators at about the same time;

That during the summer of 1981, on a number of occasions, I publicly expressed my opposition to registration within my home church congregation;

That during the 1981-1982 school year, I acted as co-chair of the Bethel College Peace Club, a public organization, and in that capacity I actively expressed my

Exh. I

opposition to draft registration on a number of occasions:

That articles concerning my opposition to the draft registration program were published in the Bethel College newspaper and in the Hutchinson News;

That during the summer of 1982, I visited twenty-nine (29) Mennonite General Conference Churches, and I actively and publicly expressed my opposition to draft registration during these same visits.

That I am informed and believe that agents of the Federal Bureau of Investigation have attempted to contact me to discuss possible prosecution for failure to register for the draft.

/s/
CHARLES EFF

SUBSCRIBED AND SWORN TO BEFORE ME THIS 13
DAY OF AUGUST, 1982

/s/ (Helen Bachman)
NOTARY PUBLIC IN AND F
SAID COUNTY AND STATE
My Appt. Exp. May 31, 1985

Exh. I

February 7, 1981
Bethel College
N. Newton, Kansas

Selective Service System
600 E Street, NW
Washington, D.C. 20435

To whom it may concern:

I am an eighteen-year-old American citizen. Because of my age, the law states that I must register for the Selective Service System. My age group was to register during the first week of January. For several reasons, however, I have refused to register.

I am opposed to war and to any preparation for war. I am also opposed to the threat of violent force to other countries, which the present registration process was declared to be. Religious and philosophical reasons form the basis for my opposition to the use of violence.

My refusal to register is therefore based partly on the understanding that I cannot participate in preparation for war.

Exh. I

nor can I participate in the threat of violent force. This leads to the belief that I cannot cooperate in any part of the military system.

My refusal to register is also a protest against the total waste of time and resources that takes place in both war and preparation for war. I am protesting against wasting billions of dollars and a great amount of natural resources and energy on the production of weapons. These billions and these resources should rather be spent correcting the terrible social and economic injustices in this country and in the world. Waging war is in itself a terrible waste of lives and resources. My protest is also against this waste.

May you therefore consider my refusal to register not an attempt to harm our country nor an attempt to avoid responsibility, but an attempt to help humankind.

Exh. I

Sincerely,

/s/

Charles Epp
Goering Hall
Bethel College
N. Newton, Kan. 67117

(permanent address) Henderson, Nebr.
68371

Exh. I

THERE IS NO COPY FOR Exhibit J of Appendix E - Russell Martin - Defendant.)

Exh. J

AFFIDAVIT

STATE OF CONNECTICUT)
) ss. Aug. 13, 1982
COUNTY OF FAIRFIELD)

COMES NOW EDWARD HASBROUCK, Affiant herein, and being first duly affirmed, deposes and says as follows:

That I will soon be indicted in the State of Massachusetts, on a charge of failure to register for the draft.

That over the course of the past year, I wrote to President Reagan, to the Attorney General of the United States, to the Selective Service System, and to various other officials, to express my opposition to the draft registration program.

That I have been a vocal and public opponent of the draft registration program; that I have spoken at public forums and meetings to express this opposition to registration; that in interviews with the press and other media I have explicitly

Exh. K

stated my opposition to registration: and that I have written articles and other similar statements opposing draft registration.

/s/
EDWARD HASBROUCK

Subscribed and affirmed to before
me on Aug 13, 1982.

/s/
T. STEVEN BLISS
COMMISSIONER, SUPERIOR COURT

EDWARD JOHN HASBROUCK
74 ELMWOOD ROAD
WELLESLEY,MASSACHUSETTS
U.S. OF AMERICA 02161
617-235-8662
3 October 1981

William French
Smith, Attorney
General of the
United States of
America
James Bond, Acting Director
of Selective Service
Warren Burger, Chief justice of the
Supreme Court
Ronald Reagan, President of the
United States of AmeriKKa
George Bush, Vice-President of the
U.S. of A. and President of the
Senate
Thomas P. O'Neill, Speaker of the
House of Representatives
Edward M. Kennedy, United States Senator
Paul Tsongas, United States Senator
Margaret Heckler, Representative in Congress

Agents of the Government of the United States of Amerika, and of the violence for which it stands:

According to reports in the public press --reports which I have neither reason nor inclination to doubt--you are now preparing to begin prosecuting some men who have not registered for the draft. I call to you attention the irrelevance of any such prosecutions.

Draft registration was instituted by President Jimmy Carter's proclamation of

2 July 1980, and continues with the collusion of President Reagan (who has let stand Carter's proclamation), the Congress (which authorized registration and funded Selective Service), and the Supreme Court (which approved registration).

I was born in Cambridge, Massachusetts on 11 January 1960, and, with those other men of my age who you claim as your citizens (subjects) was supposed to register on one of the six days 21-26 July 1980. On 17 July 1980, at a press conference in Chicago, Illinois, I announced my intention not to register and urged others to do likewise. I continued to publicise my non-registration and to advocate non-registration at Post Offices in Chicago, Boston, and Wellesley, Massachusetts throughout the July 1980 and January 1981 mass registrations. Needless to say, I did not then nor have I since registered, and my statements to that effect have

been published and broadcast throughout Amerika. I informed Brayton Harris, Ass. Director of the SS, of my intent not to register on the air in the studios of WBEZ radio, Chicago, on 22 July 1980.

The SS, meanwhile, continues to evade the draft. Although legislation and a Presidential commission report for a draft are pending, SS propaganda given to all registrants states that "there are no plans at this time for a draft." A less obvious lie--and therefore a more intimidating one--is the SS claim that non-registrants will be prosecuted. There are nearly a million non-registrants thus far, by SS estimates. But neither the federal judicial system (now at capacity--40,000 cases/year) nor the federal prisons (also at capacity--25,000 people) will be multiplied twentyfold, nor will they be dedicated exclusively to registration resisters. Knowing this, the SS knows

that only a token fraction of those who don't register can or will ever be prosecuted.

You are now preparing for just such token prosecutions of fewer than 200 selected non-registrants. This letter is an expression of my solidarity with all those who may be prosecuted. They are not alone: I shall place myself with them, and I pledge whatever nonviolent action that solidarity may require. In prosecuting any, you prosecute all, and I shall act accordingly.

I expect to be prosecuted for writing this letter. There are numerous constitutional, legal, administrative, and procedural defects in the registration laws, proclamation, and regulations, but I will offer no legal defenses. I do not expect rule-makers to follow their own rules. I have not registered, I have conspired not to, and I have conspired to aid and abet others not to. I owe you no apology. You are not my judges.

Judgement, in the end, is inherently introspective. I would no more enforce my opinions on you than have you enforce yours on me. I can only hope that you will judge yourselves by the test I apply to myself: Am I acting in the interest of survival? My life is being transformed by the realization that no life on Earth is likely to outlive what would have been my natural lifetime. There will be revolutionary change, or there will be nuclear homicide.

In the spirit of survival, I urge you to act as I hope I would act in your place: not to use your authority for "better" purposes (i.e. to redirect your violence) but to renounce your authority and organize anarchically.

This is not to say that all draft resisters are anarchists (or pacifists, or communists, or atheists). Nor is to say that I "advocate anarchy, chaos, or violence."

Anarchy--the absence of authority, the illegitimacy of violence--is a fact, a characteristic of reality. Our lives, in accepting authority, deny their nature, and in so doing have produced a chaotic and violently suicidal world. Realism demands anarchic organization-- nonviolent, nonauthoritarian, cooperative, and loving.

Join me. Renounce your authority, throw down your instruments of violence (convert them to creative uses if you can, destroy their potential for violence if you can't), smash the doors of the jails, schools, psychiatric prisons, and military bases,...
Live Free Anarchically.

Yours in Peace,

With Love,

For Revolution

/s/

Edward John Hasbrouck

Exh. K

CHICAGO CHAPTER
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Two Chicago are draft-age youths
Announce they will resist registration

Two Chicago area draft-age youths announced Thursday they will resist draft registration which is scheduled to begin Maonday, July 21.

Their announcements were made at a press conference held under the auspices of the National Resistance Committee, which is headquartered in San Francisco, Cal.

Similar press conferences were being held Thursday in more than 20 other cities around the country. Another round of press conferences is being scheduled in additional cities during the two week registration period.

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The public declarations here were made by Edward Hasbrouck, 20 of Chicago, a former University of Chicago student, and by Matthew Nicodemus, 20 , of Evanston, a student at Stanford University, Palo Alto, Cal.

Hasbrouck called on other draft-age youth to "resist the draft. If you must register, refuse to give your social security number," be added.

Nicodemus urged draft-age youth to "Think. Think. There are large risks in registering for the draft. There are large risks in not registering. Weigh the risks and then decide," he counseled.

"And if you decide to join us in resisting registration, remember, you won't be alone," he said.

Hasbrouck said he was resisting registration because, as someone "born in the Sixties, who grew up with the Viet Nam war, it is evident that force is not and cannot

be an instrument of progress.

"I am altogether scared that if I let myself into the hands of military indoctrinators, they might succeed in making me into a killing machine.

"Even more frightening," he said, "is the possibility that, like most Viet Nam veterans, I might fail to successfully deprogram myself after leaving the military."

Nicodemus said that, "I reject the concept of a military draft, and for that reason I totally reject registration for the draft."

He said he would not, "in even the slightest way, participate in war and militarism. I believe that no individual, or group of individuals, has the right to force another individual to fight, kill and perhaps die, in a war."

He also said that "the ready pool of manpower that a peacetime draft would give

to the government makes it far too easy for those in office to get our nation involved in a war without first obtaining public consent -- a consent that should come only after extended and vigorous debate."

(The full statement by each youth, along with biographical material, is attached to this news release.)

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FOR RELEASE 10:00 A.M. CDT 17 JULY 1979

The following statement was made today by Edward Hasbrouck, a 20-year-old unemployed Chicagoan who is resisting the new draft registration law and advocating resistance by others. The statement was one of those made today by Chicago-area draft-age men at a press conference held by the Chicago chapter of the National Resistance Committee. Mr. Hasbrouck was born 11 January 1960 in Cambridge, Massachusetts, and was raised in Wellesley, Massachusetts, a suburb of Boston. He came to Chicago in September 1977 to study political science in the College of the University of Chicago, where he was a student until December 1979. His involvement in political action began in high school and has continued to the present in a variety of individual and organizational forms. He is presently living at 5207 S. Blackstone Ave.,

Chicago, IL 60615.

My name is Edward Hasbrouck. I am 20 years old, unemployed, a natural-born United States citizen, and, for what I do today and will do in the weeks to come, a federal felon. I urge you to join me in felony.

Consider, if you will, the absurdity of my position. I am here to explain-- to justify--my belief that thou shalt not kill. I am here to tell you why I do not want to be a murderer, to be a slave, to join a cult, or to be brainwashed.

I am not, and will not be, a tool to be used against another person by still a third. To me, who was born with the Sixties and who grew up with the Vietnam war, it is evident that force is not and cannot be an instrument of progress. Faced with those who would use force--or, more likely, have others use force--I feel as one who, confronted with

the ravings of a madman, must explain to him why those ravings make no sense.

Anyone, if he uses enough force, can make anyone else do what he wants; but no one, no matter how much force he uses, can make anyone else think what he wants. Simply ask yourself when you have ever been forced to change your own mind. I do not believe you have.

As one veteran said, "Like in the 4th, 5th grade, you come home with a black eye, you know, and you're told...'Don't do that,' you know, 'that's stupid--to fight.' And if you can't go to the draft when you're 18, 19, you know, then once again you're stupid. So what do you do? They change it around the way they want....Like I told them in Vietnam after I threw my rifle down..."[1]

They do indeed change it around the way they want. In particular, they will change those of us who they draft--and registration

has never failed to be accompanied by a draft--around the way they want. Ramsey Clark, speaking here in Chicago last week, remarked on "the pictures of all those people [in Iran] out in the streets yelling and wailing". "Have you seen their beautiful human faces", he asked, "And wondered what it is that made them act that way? Is it something in the water?"[2] I ask the same question about the pictures of all those soldiers in the military out on the battlefields killing and wounding. Except that I know what made them act that way: the military cult, the cult of death, the oldest, most experienced, and most successful death cult in the world. And I am altogether too scared that if I let myself into the hands of their indoctrinators they might succeed in making me too into a killing machine. Even more frightening is the possibility that, like most Vietnam veterans, I might

fail to successfully deprogram myself after leaving the military.

These are some of the reasons why I will not register. I urge those of you who are subject to registration to consider what I and others are saying, to consider the consequences of registration as well as of non-registration, and to face the <u>choice</u> you must make <u>before</u> you act. Registration is irrevocable: you will never be able to remove any information you give from the Selective Service system's files. On the other hand, I am almost certain that those who register late will not be prosecuted, since to prosecute them would merely discourage others who have not yet registered from registering at all. Take your time--there is still time--and <u>think</u>.

<u>No one</u> is required to do <u>anything</u> until Saturday, July 15th. Contact the Midwest Committee for Military Counseling, 939-3349,

or come to a meeting of the Chicago Coalition Against Registration and the Draft, at which time counseling will be available, on Thursday evening, July 24th, at 7:00 at 53 West Jackson Boulevard, Chicago, Room 1333.

If you do decide that you must register, DO NOT GIVE YOUR SOCIAL SECURITY NUMBER ON THE REGISTRATION CARD. The director of the Selective Service system has already admitted publicly that, "We want it (the Social Security number), but prudence dictates that if people don't have it, we're not going to prosecute them".[3] Proposals have already been made to give the Selective Service system access to all public and private records that might enable them to track down non-registrants, but if enough registrants exercise their legal right to refuse to give their Social Security numbers those files will be almost useless.

Resist the draft. Refuse to register.

If you must register, refuse to give your Social Security number.

Peace.

1. Gary Battles, quoted by James Simon Kunen, Standard Operating Procedure, p. 105.
2. Ramsey Clark, speech delivered at Rockefeller Chapel, The University of Chicago, Friday, 11 July 1980.
3. Bernard Rostker, quoted in the Boston Globe, 8 July 1980, p. 8.

AFFIDAVIT OF GILLAM KERLEY

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

COMES NOW GILLAM KERLEY, Affiant herein, and being first duly sworn, deposes and says as follows:

That I attended a rally held in Madison, Wisconsin, on Sunday, July 11, 1982; that the purpose of the rally was to protest the draft registration program;

That the rally was sponsored by three organizations opposed to draft registration; that thes organizations were the Students for a Libertarian Society, the National Resistance Committee, and the Council for a Competitive Economy;

That Paul Jacob spoke at the rally and expressed his opposition to the draft registration program;

That Paul Jacob was introduced as a

member and representative of Students for a Libertarian Society, an organization which opposes the draft registration program;

That posters advertising the rally were placed throughout downtown Madison, Wisconsin, and the University of Wisconsin at Madison campus area; that these posters indicated that Paul Jacob would attend and speak; that a copy of the poster is attached as Exhibit A;

That announcements for the rally were published in The Capital Times, a daily newspaper of general circulation, and The Daily Cardinal, a student newspaper at the University of Wisconsin at Madison; that these announcements referred to Paul Jacob as a speaker at the rally; that these announcements are attached as Exhibits B and C;

That reporters and camera operators from at least two Madison, Wisconsin, television

stations attended the rally in their professional capacity.

/s/
GILLAM KERLEY

Subscribed and sworn to before me
this 12th day of October, 1982.

/s/
NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE

My commission expires 12-2-84.

(POSTER)

STOP IT NOW

REGISTRATION-DRAFT-WAR

RALLY

LIBRARY

MALL

(Picture of "Uncle Sam Wants You" omitted)

2:30 pm

Sunday, July 11

SPEAKERS

Paul Jacob - Students For A Libertarian Society

Alex Reyes - Coordinator For National Resistance Committee

Sheldon Richman - Council For A Competitive Economy

--Sponsors-- NATIONAL RESISTANCE COMMITTEE-
Council For A Competitive Economy
STUDENTS FOR A LIBERTARIAN SOCIETY

THE CAPITAL TIMES, Thursday, July 8, 1960

LOCAL DRAFT INDICTMENTS EXPECTED

By Dan Allegretti
Capital Times Staff Writer

The month of August probably will see a batch of indictments against Madison area men for refuseing to register for the stand-by draft, John Byrnes, U.S. attorney for the Western District of Wisconsin, said today.

There have been several cases referred to Byrnes by the U.S. Justice Department for prosecution in the past two weeks and it takes 30 to 60 days to investigate cases before a grand jury is asked for indictments, Byrnes said. He refused to say exactly how many were being investigated.

He pledged to "treat them like any other case -- I don't intend to hold up on them just so we'll have a batch of them at once." As they are completed, he said, they will

Exh. L

be referred to the grand jury.

Byrnes also said he expected more cases to be referred to him by the Justice Department.

The maximum penalty on conviction is five years in prison and a $10,000 fine. Byrnes said he would treat each case individually in deciding whether to ask for the maximum.

The first indictment since the Vietnam War for refusing to register for the draft was handed down June 30 in San Diego. Benjamin H. Sasway, a 21-year-old student at Humboldt State College, was charged with violating the Military Selective Service Act.

Byrnes said he recognized that some people appeared willing, if not eager, to be indicted so that they can publicize their views about peace-time registration and the draft. Several have even written him letters

Exh. L

Assuring him they have no intention of registering.

But such actions will have no bearing in court, he said.

"My view is they have every right to their opinions, but their personal opinions, as far as I'm concerned, will not be an issue at trial. They are not relevant in the issues to be brought out.

"The law is pretty clear that if you are a male of a certain age you are required to fill out a form and send it to the Selective Service System. The issues are: Are you one of those persons, did you send in your form, and if not is it because you forgot or was there some other reason other than a personal belief that you shouldn't have to do that?"

Last week the FBI contacted Michael McMillan, 21, who moved to Madison earlier this year from La Crosse and has been active

in the peace movement here. McMillan said at a press conference that he expected to be the first person in the Madison area to be indicted for failure to register for the draft and that he would go to jail before he would register.

If indicted, he said, "My hope is to raise the whole issue of why I didn't register and relate it to military policies in the United States."

McMillan said he wanted to use the courtroom as "a forum of ideas and if enough community support is directed toward the trial, it would be politically impossible... to prosecute other people."

On Wednesday, a second Madison man announced publicly that he had been contacted by the FBI for refusing to register.

Gillam Kerley, 21, said he met with FBI agents Tuesday at the federal courthouse building on Monona Avenue. The agents offered

him a chance to avoid prosecution by registering within five days, "but I'm not going to do that," he said.

Like McMillan, Kerley -- who describes himself as a free-lance writer and peace activist -- was required by law to register two years ago, when the peacetime registration law took effect. Instead, he notified the Selective Service of his refusal to register, as did McMillan.

Kerley said he felt the sole reason for the FBI to interview him was to elicit information that could be used later in court. He handed the agents a written statement saying he would surrender voluntarily if indicted and told them that "while I had nothing to hide or be ashamed of, I saw no reason to provide them with information to help them prosecute me."

Kerley has helped organize the Madison Draft Resistance Coalition and is a member

of the Committee to Stop Militarism and the Draft. He also has investigated military research at the University of Wisconsin.

He explained his reasons for refusing to register:

"There has never been a registration without a draft, and a war has followed on the heels of every draft. In an era of nuclear overkill, any conventional conflict may escalate into a nuclear holocaust. Our only protection lies in resisting all moves toward war, and in ending the causes of war."

An anti-draft rally will be held at 2:30 p.m. Sunday at the UW Library Mall. Speakers will include Kerley; Alex Reyes, coordinator of the National Resistance Committee; Sheldon Richmand of the Council for a Competitive Economy and Paul Jacob of Students for a Libertarian Scoiety.

Both NRC and SLS support and encourage illegal but nonviolent resistance to the draft registration.

SUPPORT RALLY FOR
RESISTERS SUNDAY

Madison non-registrant Gillam Kerley will speak at an anti-draft rally to be held Sunday, July 11, at 2:30 p.m. on the Library Mall. In addition to Kerley, Alex Reyes, who is coordinator of the National Resistance Committee (NRC), will also speak. The NRC's membership includes 1960s activists Daniel Berrigan and David Harris.

Also speaking will be Sheldon Richman, of the Council For A Competitive Economy, and Paul Jacob, of the Students For a Libertarian Society (SLS). SLS, with over 120 campus chapters nationwide, has been a leading force in vocal opposition to draft registration. Both the NRC and the SLS support and openly encourage illegal non-violent resistance to draft registration.

Although President Reagan once denounced draft registration as a hollow political ploy and an unwarranted invasion of the rights

of young people, he now threatens to prosecute young men who fail to register for the draft. Rally organizer David Beito said, "Young people will not stand for a return to the draft and the interventionist foreign policy that goes with it."

JOINT

APPENDIX

Office-Supreme Court, U.S.
FILED
JUL 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1292

In The

Supreme Court of the United States

October Term, 1983

DAVID ALAN WAYTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
FEBRUARY 2, 1984
WRIT OF CERTIORARI GRANTED
MAY 29, 1984

Vol. II of III

BEST AVAILABLE COPY

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GOVERNMENT EXHIBITS - TESTIMONIAL HEARING (INDEXED)

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SELECTIVE SERVICE VIOLATIONS

I. Evolving Prosecutive Policy

Registration under the Military Selective Service Act began July 21, 1980. Section 462(a) of title 50 Appendix, United States Code, provides punishment for one "who . . . evades or refuses registration" with the Selective Service System.

There are three principles which will establish a broad perimeter for Selective Service prosecutions. First, the primary goal of any prosecution policy must be to encourage and to facilitate registration. Second, a failure to register should be viewed as a serious matter. Third, section 462(c) requires that the Department of Justice proceed expeditiously with prosecutions at the request of the Director of the

Selective Service. (emphasis added)

We will await further information from the Selective Service concerning registration statistics before we create a comprehensive policy.

II. "Counseling" Violations

Section 462(a) also provides punishment for a person "who knowingly counsels, aids, or abets another to refuse or evade registration . . ." A "counseling" violation may exist even if the person counseled does not refuse or evade registration. See Gara v. United States, 178 F.2d 38, 40 (6th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 857 (1950); Warren v. United States, 177 F.2d 596, 598 (10th Cir. 1949), cert. denied, 338 U.S. 947 (1950).

Since prosecutions under the counseling prohibition of section 462 are liable to generate sharp First Amendment issues, such

prosecutions, absent exigent circumstances, should not be undertaken without prior approval by the General Litigation and Legal Advice Section (FTS 724-7144).

(Criminal Division)

Heymann Memo 9/28/80 - Exhibit 2

Typed: 7/14/81
Retyped: 7/16/81

The Attorney General — Typed 9/16/90
The Deputy Attorney General — SEP 22 1980

Philip B. Heymann
Assistant Attorney General
Criminal Division

De:artment of Justice Response to Selective Service Registration Problems

By proclamation, the President directed nineteen and twenty year old male citizens and other unexempted males residing in the United States to register with the Selective Service System in late July and early August of this year. We are in the process of creat-

ing policy and procedures for prosecuting those who fail to register.1/

Selective Service is not ready to refer matters for possible prosecution. It has not even created a workable system for identifying persons who have not registered. Without knowing the Service's approach to persons who refuse to register, we have been unable to develop a complete prosecutive policy. Instead, we have adopted a posture of viewing the failure to register as a serious matter, thus, we hope, further encouraging registration. At the same time we are developing a policy in step with the Service and preparing for future prosecutions.

The Criminal Division has published in the United States Attorneys' Bulletin an

1/ Selective Service reports that 93% of those required to register have done so. While the figure is encouraging, it still means that approximately 200,000 men have not complied with the registration requirement.

item on the evolving prosecutive policy under 50 U.S.C. App. §642(a). First, the Division stated that the primary goal of any prosecutive policy must be to encourage registration. Second, the Division stated that a failure to register should be viewed as a serious matter. Third, the Division noted that section 462(c) requires that the Department proceed expeditiously to prosecute cases and appeals at the request of the Director of Selective Service. The division also noted that prosecutions for counseling others to refuse to register are likely to raise sharp first amendment issues. Thus, in the absence of exigent circumstances, the Division required that United States Attorneys obtain Departmental approval before initiating "counseling" prosecutions.

The Division is in the process of researching the impact of the lower court injunction and the Supreme Court stay in

Rostker v. Goldberg, 49 U.S.L.W. 3013 (U.S. S.Ct., Chambers Opinion by Justice Brennan) on prosecutions under section 462(a). It is also preparing a memorandum on proving the elements of a section 462(a) offense. Appropriate information will be disseminated to United States Attorneys.

Although the Selective Service General Counsel declined an earlier meeting because the Service did not yet know the direction it would take regarding enforcement, the Division has not scheduled a meeting with Selective Service representatives. The purpose of the meeting is to learn Selective Service's pleas concerning those people who have not registered, to ensure that such plans do not adversely impact on prospective prosecutions, and to create the best means of transmitting information between the Selective Service and the Department.

I envision that the Department's primary

roles will be developing policy and giving guidance to United States Attorneys' offices. The Criminal Division tentatively plans to ask Selective Service initially to refer a small number of matters directly to the Department. The Division will then review the matters and refer them to the appropriate United States Attorneys' offices for prosecution.2/ At the time of referral and as the prosecutions progress, the Division will provide any needed assistance. After the first several successful prosecutions, the Division will prepare a United States Attorneys' Manual item reflecting the lessons learned from the prosecutions. The Division then will ask Selective Sergice to refer matters directly to the appropriate United States Attorneys'offices.

2/ The Division is considering a policy of offering pre-trial diversion to those persons who register after their cases are referred for prosecution.

I shall keep you informed as prosecutive policy evolves.

Jensen Memo 6/4/81 - Exhibit 3

JUN 4 81

D. Lowell Jensen
Assistant Attorney General
Criminal Division

Typed: 5-27-81

Prosecution of Persons Who Refused to Register with Selective Service

Rudolph Guiliani
Associate Attorney General

Selective Service intends to refer 75 to 100 matters to the Department of Justice in mid-June for investigation and possible prosecution. 1/ These are matters in which young men wrote to the Service and stated that they refused to register. The Service

1/ Criminal Division attorneys were informed of the anticipated referrals in a May 26, 1981, meeting with Selective Service Associate Director for Policy, Development and Administrative Legal Systems Edward Frankle and General Counsel Henry Williams. Even the mid-June date is tentative.

is also creating an enforcement mechanism for instances in which it has received other information that individuals failed to register. Finally, the Service is in the initial stages of creating an active enforcement mechanism which is general in nature. 2/

Section 462(a) of title 50, United States Code Appendix, prohibits the evading or refusing to register with the Selective Service System. Persons convicted of violating the section may be fined not more than $10,000 or imprisoned not longer than five years or both.

There are two possible problems with proceeding at this time with prosecution. First, the constitutionality of the Selective Service System is under serious attack in the United States Supreme Court. Second,

2/ The Service would like to obtain access to Social Security records. Apparently one version of a defense appropriations bill would give it such access.

the President has just reiterated his preference for a volunteer military. Thus, assuming that Selective Service does refer to us matters of alleged evasion of registration, the Department must decide whether to commit resources to prosecutions when the Supreme Court may declare the registration scheme unconstitutional 1/ and when the announced position of the Executive Branch may seem somewhat inconsistent with universal male registration.

In the absence of any contrary direction, we intend to review the matters referred by Selective Service, initiate investigation when warranted, and refer meritorious matters to appropriate United States Attorneys Offices for prosecution. Further, we will coordinate with the United States Attorneys on the handling of the initial

1/ Selective Service predicts that the Court will issue an opinion in late June.

cases to ensure relative uniformity on the Department's approach to major legal and procedural issues. Nevertheless, since such referrals, investigations, and prosecutions are likely to generate intense press and judicial scrutiny, we would appreciate assurance that our proceeding with prosecutions is consistent with Administration policy.

Guiliani Memo 6/19/81 - Exhibit 4

U.S. Department of Justice

Office of the Attorney General

Washington, D.C. 20530

June 19, 1981

MEMORANDUM TO: D. Lowell Jensen
Assistant Attorney General
Criminal Division

FROM: Rudolph W. Guiliani
Associate Attorney General

SUBJECT: Prosecution of Selective Service Case

The Attorney General and I have discussed the questions you have raised concerning the prosecution of those individuals who have failed to register for the draft. We decided, as you have suggested, that we should initiate no prosecutions until the Supreme Court decides the presently pending case challenging the constitutionality of the current registration provisions.

Meanwhile, on the assumption that the provisions will not be held unconstitutional, we should begin to formulate a policy with respect to these cases. The Attorney General and I agree that the President's position on the question whether there should be a draft has no relevance here. That position does not bear on the question whether there must be compliance with and enforcement of the existing statutes. Perhaps someone in your Division can begin to formulate guidelines on factors to guide our prosecutive

decisions. Generally, we might consider:

(1) prosecuting all who fail to register;

(2) prosecuting "aggravated" cases, with some general list of factors defining those aggravated circumstances; or

(3) prosecuting those who refuse to register only after a warning (although this tends to take the teeth out of any mandatory system).

These, of course, are tentative suggestions. However, I think we would do well to begin to formulate some guidelines, however general.

Kline Memo 7/6/81 - Exhibit 5b

July 6, 1981

Prosecution of Selective Service Cases

Lawrence Lippe, Chief General Litigation and Legal Advice Section Criminal Division	David J. Kline, Senior Legal Advisor Protection of Government Operations General Litigation and Legal Advice Section

On June 19, 1981, Associate Attorney General Rudolph W. Giuliani forwarded a memorandum directing the Criminal Division (1) to bring no prosecutions against those who fail to register with Selective Service until the United States Supreme Court rules on the challenge to registration and (2) to create prosecutive guidelines in the event the Supreme Court rules in favor of the government. On June 25, 1981, the Supreme Court upheld the all-male registration scheme.

Selective Service sent approximately 170 letters to persons who refused to register. These letters gave the non-registrants fifteen days to register or to explain why they should not register. The Service now anticipates making its first referrals to the Department during the week of July 6, 1981.

This first wave of referrals will consist

of names of young men who fall into two categories: (1) those who wrote to Selective Service and said that they refused to register and (2) those whose neighbors and others reported them as persons who refused to register. Since the information concerning violations is being brought to its attention, the Service calls this a "passive" enforcement system.

Selective Service is still exploring ways to develop an "active" enforcement system. It prefers obtaining access to Social Security records 1/ and comparing such records with its registration lists. We cannot predict, however, either the form or the fairness of the ultimate Selective Service enforcement program. Since an estimated

1/ There is a provision in a defense appropriations bill to give the Service access to Social Security records. Apparently the Administration has not yet decided whether to support such an enforcement program.

500,000 eligible persons have failed to register, no matter what program Selective Service ultimately adopts, the initial referrals to the Department of Justice are only the first stop in a long process of referrals which will continue as long as the government requires registration.

The first wave of referrals is likely to attract the greatest publicity. Therefore, what we do will have great impact on compliance with the registration scheme. While the universe of 170 non-registrants is larger than I had hoped it would be,2/ the number is still reasonable to work with. I suggest the following course of action.

1. We should review the referrals to determine whether there are

2/ Some persons receiving Selective Service letters are registering. Others are not within the class of people who must register. Therefore, the number of initial referrals should be significantly less than 170.

any that should not be investigated. I would include in this category referrals that appear to be "crank names," names without sufficient identifying information, etc.

2. After our review, we should refer to the Federal Bureau of Investigation every matter involving a person whom the information reasonably reveals should register.

3. At the time of referral to the Federal Bureau of Investigation, we should request that the Bureau refer the reports to the appropriate United States Attorney with copies to the Criminal Division.

4. At the time of referral to the Bureau, we should also send a package to the United States Attorneys in whose districts the investigation targets reside. The package

should include the memorandum on essential elements of prosecutions under 50 U.S.C. App. §462 and a letter explaining prosecutive policy under the section. We should also offer our assistance and ask to be kept advised.

5. The general prosecutive policy for the first wave of referrals should be as follows:

a. All persons brought to our attention by Selective Service should be penalized if they should have registered.

b. All those who register between the time of referral to the Department of Justice and indictment should be offered the opportunity to participate in the

pretrial diversion program.

c. Those who refuse to register should be prosecuted.

d. This policy should be subject to exceptions if compelling reasons exist and if authorized by the Criminal Division.3/

3/ The referrals may eventually exceed our ability to adhere to the proposed policy. If so, then we can change the policy. The new criteria for prosecutions can be based on information gathered from the referrals.

Jensen Memo 7/14/81 - Exhibit 6

Prosecution of Selective Service Cases

July 14, 1981

To
The Attorney General

From
D. Lowell Jensen
Assistant Attorney General
Criminal Division

On June 19, 1981, it was decided by the Associate Attorney General that (1) no prosecutions would be brought against those who fail to register with Selective Service until the United States Supreme Court rules on the challenge to registration and (2) prosecutive guidelines would be developed in the event th Supreme Court rules in favor of the government. On June 25, 1981, the Supreme Court upheld the all-male registration scheme.

Selective Service sent approximately 170 letters to persons who refused to register. These letters gave the non-registrants

fifteen days to register or to explain why they should not register. The Service now anticipates making its first referrals to the Department during the week of July 6, 1981.

The first wave of referrals will consist of names of young men who fall into two categories: (1) those who wrote to Selective Service and said that they refused to register and (2) those whose neighbors and others reported them as persons who refused to register. Since the information concerning violations is being brought to its attention, the Service calls this a "passive" enforcement system.

Selective Service is still exploring ways to develop an "active enforcement system. It prefers obtaining access to Social Security records 1/ and comparing such

1/ There is a provision in a defense appropriations bill to give the Service access to Social Security records. Apparently the Administration has not yet decided whether to support such an enforcement program.

records with its registration lists. We cannot predict, however, either the form or the fairness of the ultimate Selective Service enforcement program. Since an estimated 300,000 eligible persons have failed to register, no matter what program Selective Service ultimately adopts, the initial referrals to the Department of Justice are only the first step in a long process of referrals which will continue as long as the government requires registration.

The first wave of referrals is likely to attract the greatest publicity. Therefore, what we do will have great impact on compliance with the registration scheme. While the universe of 170 non-registrant is larger than I had hoped it would be,2/ the number is still reasonable to work with.

2/ Some persons receiving Selective Service letters are registering. Others are not within the class of people who must register. Therefore, the number of initial referrals should be significantly less than 170.

Attached hereto are proposed enforcement guidelines for dealing with Selective Service referrals. They are predicated on the premise that we should strive to achieve compliance without overburdening the FBI, United States Attorneys and the courts.

Selective Service Enforcement Program

1. Selective Service will send registered notices to persons who refused to register notifying them that unless they register within a specified period, the matter will be referred in the Department for possible criminal prosecution.
2. All referrals will be made to the Criminal Division which will review them to determine if further investigations is warranted.
3. The Criminal Division will refer cases to the FBI with copies to the United

States Attorneys.

4. The United States Attorney will notify the subject by registered mail that the referral has been received, that the knowing failure to register is a felony, and that unless registration is accomplished within a specified time, prosecution will be considered. In appropriate cases, the United States Attorney will indicate his or her willingness to meet with the subject to discuss any mitigating factors suggesting that prosecution not be initiated.

5. In cases where registration is accomplished prior to indictment, the case will be dropped.

6. Where registration is accomplished after indictment but before trial, the government will seek the imposition of an appropriate sanction ranging from pretrial diversion to probation depending

on the circumstances.

7. No cases will be declined or dismissed without the expressed authorization of the Criminal Division.

Frankle Letter 7/20/81 - Exhibit 7

SELECTIVE SERVICE SYSTEM
National Headquarters/Washington, D.C. 20435

July 20, 1981

Mr. Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division
Department of Justice
Box 887
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Lippe:

In accordance with our previous discussions, Selective Service hereby refers, for investigation and possible prosecution, the names of 134 individuals who may be in violation of the registration provisions of the Military Selective Service Act (50 USC,

App. 451 et seq).

The names of all of the individuals being referred came to our attention by way of direct or indirect citizen contacts with this agency. Whenever the information received was sufficient to permit correspondence, a certified, return receipt requested, letter was sent to the individual requesting verification of his status. Such a letter was sent in 103 of the 134 cases. These cases can be readily identified since the file folder label for each is green in color. The file folders for the 31 individuals who were not sent letters have orange labels.

The 103 individuals who were sent letters have been divided into four main categories for your convenience. Category I consists of 16 individuals who responded to our letter with a specific refusal to register. Category II contains 45 individuals who received the letter but did not reply. Category

III represents 37 individuals whose letters were not delivered and were returned to Selective Service. Finally, Category IV contains five persons whose letters were not returned and for which return receipts were not received.

We are most anxious to provide you with whatever additional information or assistance you may need in processing of these cases. I will be the contact point in Selective Service for any inquiries or requests relating to these referrals. My telephone number is 724-0844.

Sincerely,

/s/

Edward A. Frankle
Associate Director,
Policy Development and
Administrative Legal
Systems

Jensen Memo 8/17/81 - Exhibit 8

UNITED STATES DEPARTMENT OF JUSTICE
Assistant Attorney General
Criminal Division
Washington, D.C. 20530

August 17, 1981

MEMORANDUM

TO: ALL UNITED STATES ATTORNEYS

FROM: D. LOWELL JENSEN
Assistant Attorney General
Criminal Division

RE: Possible Violations of the Military Selective Service Act

Selective Service referred to the Department of Justice the names of 134 persons who allegedly failed to register with the Service as required by Presidential Proclamation 4771. Such a failure to register would violate 50 U.S.C. App. §462(a). The Criminal Division has reviewed the files and will refer 108 names to the Federal Bureau of Investigation. 1/

1/ Of the remaining names 23 were referred to the Service by the Immigration and Naturalization Service's Galveston Border Patrol (cont.)

The Criminal Division has established the following procedure and policy relating to Selective Service prosecutions.

1. When Selective Service has an address for a possible non-registrant, it will send a registered notice to such person.

2. When a possible non-registrant continues to refuse to register or when Selective Service does not have a sufficient address, the Service will refer the information to the Criminal Division.

3. The Criminal Division will refer matters that appear to warrant investigation to the Federal Bureau of Investigation. Copies of the referrals will be sent to appropriate United States Attorney's offices.

1/ (cont.)
office. We have referred those names to the INS to determine which persons are still within the United States and what their present addresses are. Two persons registered subsequent to the Service's referral to the Department, and one person was discovered not to be within the class of persons who must register.

4. At the appropriate time the United States Attorney will notify the subject by registered mail that he has been identified as a possible non-registrant. Enclosed with the registered letter will be a special registration form prepared by Selective Service. The subject will be informed that unless he registers within a specified time, prosecution will be considered. When appropriate, the United States Attorney will indicate his or her willingness to meet with the subject to discuss any factors which may militate against prosecution.

5. The United States Attorney will send a copy of the non-registrant letter to Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Box 887, Ben Franklin Station, Washington, D.C. 20044. The Criminal Division will notify Selective Service of the United States Attorney's letter and will request immediate notification

if such person should register.

6. When a non-registrant registers prior to indictment, the investigation will be terminated.

7. When the non-registrant registers after indictment but before trial, the United States Attorney will seek the imposition of an appropriate sanction ranging from pretrial diversion to probation.

8. If a non-registrant continues to refuse to register, he will be prosecuted unless compelling reasons exist which warrant a declination.

9. No cases or matters will be declined or dismissed without prior authorization from the Criminal Division.

We shall prepare and disseminate a memorandum concerning essential elements of a prosecution pursuant to 50 U.S.C. App. §462(a) for failing to register with Selective Service.

United States Attorneys may contact the

General Litigation and Legal Advice Section at FTS 724-7144 if they have any questions concerning prosecutions or policy for Military Selective Service Act violations.

This memorandum is not for public consumption. Freedom of Information Act requests for it should be forwarded to the Executive Office for United States Attorneys pursuant to United States Attorneys' Manual §1-5.000 et seq.

Lippe Memo 10/20/81 - Exhibit 9b

Subject	Date
Freedom of Information Act Request - #7061	20 October 1981
To	**From**
Fred Hess, Acting Director Office of Legal Support Services Criminal Division	Lawrence Lippe, Chief General Litigation and Legal Advice Section Criminal Division

By the attached memorandum, your office informed us that it did "not think that item

1 can be exempted from disclosure." "Item 1" is the August 17, 1981, Memorandum to All United States Attorneys concerning prosecutive policy for violations of the Military Selective Service Act.

The memorandum adopts a liberal prosecutive policy toward persons who refuse to register with the Selective Service System. Non-registrants will be sent letters by Selective Service, if the Service has a sufficient address, and will be sent letters by United States Attorneys. If non-registrants continue to refuse to register, they will probably be interviewed by an agent of the Federal Bureau of Investigation. Even then, if a non-registrant registers prior to indictment, the investigation will be terminated and the former non-registrant will suffer no penalty. If a non-registrant "registers after indictment but before trial," United States attorneys are directed to "seek

the imposition of an appropriate sanction ranging from pretrial diversion to probation.*

As you know, the registration scheme is relatively new. It was only in January of this year that registration became a continuing duty. Since the prospective prosecution of non-registrants appears to generate a large amount of public interest, the manner in which the Department handles these cases is likely to have great impact on the continued viability of the registration scheme. If we handle the cases well, then registration is likely to increase. If we handle them poorly, then registration is liable to decrease.

*/ Our position might conceivably change in the future if, for example, the memorandum is leaked to the press or if we are compelled to disclose the memorandum during a criminal prosecution.

Frankle Letter 10/21/81 - Exhibit 10

SELECTIVE SERVICE SYSTEM
National Headquarters, Washington, D.C. 20435

October 21, 1981

Mr. Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division
Department of Justice
Box 887
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Lippe:

In accordance with our previous discussions, Selective Service hereby refers, for investigation and possible prosecution, the names of 49 individuals who may be in violation of the registration provisions of the Military Selective Service Act (50 USC, App. 451 et seq).

The names of all of the individuals being referred came to our attention by way of direct or indirect citizen contacts with this agency. Whenever the information received was sufficient to permit correspondence.

a certified and return-receipt-requested letter was sent to the individual requesting verification of his status. Such a letter was sent in 47 of the 49 cases. These cases can be readily identified since the file folder label for each is green in color. The file folders for the 2 individuals who were not sent letters have orange labels.

The 47 individuals who were sent letters have been divided into four main catefories for your convenience. Category I consists of four individuals who responded to our letter with a specific refusal to register. Category II contains 29 individuals who received the letter but did not reply. Category III represents 13 individuals whose letters were not delivered and were returned to Selective Service. Finally, Category IV contains one person whose letter was not returned and for which a return receipt was not received.

We have also included two files containing additional information on two individuals who were referred to you previously.

We are most anxious to provide you with whatever additional information or assistance you may need in the processing of these cases. I will be the contact point in Selective Service for any inquiries or requests relating to these referrals. My telephone number is 724-0844.

Sincerely.

/s/

Edward A. Frankle
Associate Director,
Policy Development
and Administrative
Legal Systems

Kline Memo 11/18/81 - Exhibit 11

Subject	Date
Second Wave of Selective Service Violation Referrals	November 18, 1981

To
Files

From
David J. Kline, Senior
Legal Advisor
General Litigation and
Legal Advice Section
Criminal Division

On November 18, 1981, I handcarried, to Special Agent John McNabb of the FBI, 46 of the files referred by Selective Service on October 21, 1981. Ms. Aker made copies of the files and will be sending such copies and appropriate memoranda to pertinent United States Attorneys Offices.

Of the 49 referral files, two appear to be aliens and one had registered prior to referral.

General Litigation
Kline (2)

Lippe Memo 12/17/81 - Exhibit 12

Subject
Prosecution of Selective Service Non-Registrants

Date
DEC 17 1981

To D. Lowell Jensen
Assistant Attorney General
Criminal Division

From Lawrence Lippe,
Chief General
Litigation and
Legal Advice
Section Criminal
Division

In order to insure that all United States Attorneys who have active Selective Service matters are aware of the directive suspending efforts in seeking indictments, we propose that the attached teletype message be sent. Although telephone calls were made to all United States Attorneys' Offices in which our records indicated matters were pending, there has been some shifting of files between offices. Consequently, we cannot be certain that all appropriate offices were notified.

Since the Government's policy is one of not seeking indictments, we also do not want United States Attorneys to send letters to non-registrants in which they threaten prosecution. At the same time, we should protect the registration scheme. The public pronouncement of a suspension of efforts in seeking indictments in non-registration matters undoubtedly will injury registration. We do not wish to compound the effect.

The attached teletype informs United States Attorneys that they may, in their discretion, perform any appropriate action to implement the Department's August 17, 1981, policy except for seeking indictments or threatening prosecutive action. We think that such an approach will do the least damage to both the United States Attorneys' offices and to Selective Service. In addition, the teletype message directs United States Attorneys to refer news media inquiries

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to the Department's Office of Public Affairs.

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Attachment

Gen.Lit.Sec.
Kline
Jensen

Telegraphic Message
Name of Agency
DEPARTMENT OF JUSTICE
GENERAL LITIGATION AND LEGAL ADVICE SECTION, CRIMINAL DIVISION

Action PRIORITY

Accounting Classification
2B1317

Date Prepared
12/16/81

For Information Call

Name	Phone Number
DAVID J. KLINE	724-7144

MESSAGE TO BE TRANSMITTED

TO: ALL UNITED STATES ATTORNEYS

RE: PROSECUTION OF SELECTIVE SERVICE NON-REGISTRANTS

THIS IS TO CONFIRM THAT THE DEPARTMENT OF JUSTICE HAS TEMPORARILY DIRECTED ALL UNITED STATES ATTORNEYS NOT TO [SEEK INDICTMENTS OF PERSONS WHO ALLEGEDLY WERE REQUIRED TO REGISTER WITH THE SELECTIVE SERVICE SYSTEM

BUT WHO FAILED TO DO SO.]

SINCE THE SUSPENSION OF PROSECUTIVE EFFORTS MAY ONLY BE TEMPORARY, UNITED STATES ATTORNEYS MAY IN THEIR DISCRETION PERFORM ANY ACTION APPROPRIATE, SHORT OF INDICTMENT, FOR IMPLEMENTING THE DEPARTMENT'S AUGUST 17, 1981, POLICY CAPTIONED "POSSIBLE VIOLATIONS OF THE MILITARY SELECTIVE SERVICE ACT." HOWEVER, AS SHOULD BE APPARENT, UNITED STATES ATTORNEYS SHOULD NOT WARN ALLEGED NON-REGISTRANTS OF POSSIBLE PROSECUTIVE ACTION UNTIL EITHER THE ADMINISTRATION TAKES A POSITION IN FAVOR OF CONTINUING SELECTIVE SERVICE PROSECUTIONS OR UNTIL FURTHER DIRECTION FROM THIS DIVISION.

ALL NEWS MEDIA INQUIRIES CONCERNING PROSECUTIONS FOR THE FAILURE TO REGISTER WITH SELECTIVE SERVICE SHOULD BE REFERRED TO THE OFFICE OF PUBLIC AFFAIRS IN THE DEPARTMENT OF JUSTICE AT (202)633-2010.

D. LOWELL JENSEN
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Lippe Memo 1/11/82 - Exhibit 13

Typed: 1/11/82

Options for Prosecution of Persons Who Fail to Register with Selective Service

D. Lowell Jones
Assistant Attorney General
Criminal Division

Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division

Congress recently enacted section 916(b) of Public Law 97-86 which provides that the President may require the Secretary of Health and Human Services to supply to Selective Service names, birth dates, social security numbers, and addresses of persons required to register with the Service. If Selective Service obtains such information from Social Secvrity and matches the names of registrants against the information, the Service may create a huge list of possible non-registrants. Based on estimates drawn from census figures, this list could number approximately 800,000 persons. Accordingly, it is important that this Department establish a prosecutive policy designed to deal

with massive referrals.

I. PRESENT POLICY

Our present policy is designed to assure the maximum notice to an alleged non-registrant. Selective Service, if it has a sufficient address, sends a letter to the non-registrant. If that letter fails to achieve compliance and the case is referred to the Department of Justice, the cognizant United States Attorney sends a letter to the non-registrant. In most instances the non-registrant will be interviewed by an agent of the Federal Bureau of Investigation. Even then, a non-registrant can avoid prosecution simply by registering prior to indictment.

Selective Service has referred 183 files to us. We, in turn have referred 150 files to the Federal Bureau of Investigation and the appropriate United States Attorneys' offices.

Since the number of referrals has been small, we have attempted to create a universally encompassing enforcement system in which any person who comes to our attention as a non-registrant either registers or is prosecuted.

II. OPTIONS IN THE EVENT OF LARGE NUMBERS OF REFERRALS

Initial compliance with registration requirements was approximately 97%. When the media lost interest in the issue, compliance dropped steadily. It then rose again with the news of referrals to the Department and the Service's mass mailing of notices to registration-age men.

Now that the present Administration has issued a clear statement of its full support for the registration scheme, it is reasonable to anticipate that there will be a very substantial increase in the percentage of registration-age men who register. Further,

the announced 30-60 day grace period should result in registration by a substantial number of past non-registrants. As a result, we suspect that the number of non-registrants remaining after the grace period will be substantially less than the 100,000 figure.

Notwithstanding the likely impact of the Administration's recent announcement, the total number of non-registrants will doubtless remain very high when measured against the Department's prosecutive resources. However, an initial round of well publicized, successful prosecutions should have a dramatic effect in further reducing the number of non-registrants.

Set forth below is a brief discussion of some of the possible options available to the Department in responding to large numbers of referrals.

A. CONTINUE PRESENT POLICY - LOW OPTION

In the event of large numbers of referrals, we can attempt to continue our present policy of prosecuting everyone who refuses to register. However, as United States Attorneys invest their resources into prosecuting crimes with higher priorities, large backlogs may develop, resulting eventually in the failure to prosecute some non-registrants.

It can be argued, however, that general deterrence does not depend on prosecuting every case that comes to the attention of the government. We first would have to accept the simple fact that, although some persons will be prosecuted, there will be others who are neither registered nor prosecuted. Nevertheless, such a policy, geared to present funding levels, might well yield sufficient registrations to maintain the

credibility of the system.

B. CONTINUE PRESENT POLICY - HIGH OPTION

It seems axiomatic that the swifter and surer the prosecution, the greater the general deterrence. We may wish to continue our present universally encompassing enforcement system in which Selective Service identifies all non-registrants through their Social Security numbers and we prosecute all such persons who continue to refuse to register. This way all appropriate persons are either prosecuted or registered.

The creation of such a system will have its costs. Assuming the unlikely event that the Administration's announcement of its intent to continue registration suddenly brings 99 percent compliance from all prior non-registrants, there still will remain approximately 8,000 recalcitrant people.1/

1/ For comparison purposes, it can be noted that in Fiscal Year 1980, United States Attorneys filed 46,229 cases.

Even if the initial round of prosecutions is successful in fostering substantial additional voluntary registration, it is still likely that this "high option" approach will require money for new positions, both clerical and professional, in the Executive and Judicial Branches.

C. CREATE A DECLINATION POLICY SO THAT PROSECUTION OF A LARGE PORTION OF THE NON-REGISTRANTS IS DECLINED

A way to avoid the backlog problem while spending less than is required for a universally encompassing enforcement system would be to create a declination policy so that prosecution is declined against a large portion of non-registrants.

Several logical bases exist for creating a declination policy. It could be drafted, for example, so that those who were not wanted in the military would not have to register. Distinctions could be made on the

basis of mental and physical handicaps, sexual preference, health problems, and height and weight problems. However, we suspect that such a group of people is not large enough so that creating a declination policy based on the presence of such characteristics would significantly diminish the prosecutable group. Moreover, we do not believe that the Department of Justice should decline cases based on any of those categories except, perhaps, mental and physical handicaps.

As an alternative, we could decline cases against persons who refuse to register because of their religious beliefs. Of the non-registrants referred to us, such beliefs seem to be a reason given for the refusal to register in a significant number of cases. 2/

2/ We suspect that his may not be true of the entire universe of non-registrants. Our sample is probably not typical since it was composed largely of persons who wrote to Selective Service expressing their reservations against registration.

The major problem with any such declination policy is that we would not want insincere believers to escape prosecution. Therefore United States Attorneys would be compelled to inquire into and distinguish among religious beliefs - a role which we think inappropriate.

D. USE CONSTRUCTIVE REGISTRATION

Since, with the authorization of the President, Selective Service may now obtain access to Social Security records, the investigation necessary for prosecution is likely to discover all of the information requested of a registrant.

Existing cases hold that constructive registration in appropriate circumstances is a defense to a prosecution for failing to register. See, e.g., United States v. Norton, 179 F.2d 527 (2d Cir. 1950). We could, therefore, adopt the theory of

constructive registration and use it liberally for our own purposes. Then, except in the most troublesome of cases, we could constructively register non-registrants. For example, persons who verify the information once in the possession of the government would avoid prosecution and be constructively registered. Those who continue to be recalcitrant would be prosecuted.

There are two problems with adopting a liberal interpretation of constructive registration. First, our one experience with attempting to constructively register a non-registrant 3/ ended dismally when the non-registrant moved, thus making his address incorrect. Second, such a policy would be self-defeating. Once it became known that the government was engaged in constructive registration on a large scale, the incentive

3/ He supplied all pertinent information in a FOIA request for documents concerning the investigation into his failure to register.

voluntarily would vanish.

E STREAMLINE THE SYSTEM FOR PENALIZING NON-REGISTRANTS

The final alternative for creating a prosecutive system is to reduce the work involved in penalizing non-registrants. If the work is reduced, the government can bring more cases in less time.

The prohibition against failing to register is accompanied by a five-year felony penalty. Since failing to register when there is no draft seems to injure the Nation less than failing to register when there is compulsory service, a rational basis exists for lessening the penalty for failing to register when on draft exists. If the penalty is made into a misdemeanor or a petty offense, then no indictment is required. If it is made into a petty offense, no jury trial is required. 4/

4/ It has been suggested that we create a civil enforcement scheme for the failure to (cont.)

There are three problems with reducing the penalty. First, it is an accepted theorem of criminal law that the larger the penalty, the greater the deterrence. If the theorem works, then reducing the penalty will result in an increase in the number of people who refuse to register. Second, an Administration position in favor of decreasing the penalty may be perceived as softness on the issues of military preparedness. Third, since a reduced penalty will require legislation, fairness will probably demand that we delay initiation of prosecutions until the new legislation is in place. Such a delay in initiating prosecutions may in itself injure the registration scheme.

4/ (cont.)
register. Under such a scheme, if a person fails to register we could obtain an injunction. If the person still refuses to register, we could then seek either criminal or civil contempt sanctions. Since this process would require that the United States twice appear in court, it would not appreciably lighten, and may make heavier, the work of government personnel.

III. CONCLUSION

It is our conclusion that the Department should for the next four to six months continue its current policy, even in the event of large numbers of referrals. In other words, we suggest adhering to the position that all non-registrants referred to us by Selective Service either register or be prosecuted. The only possible exceptions would be for (1) rare sui generis situations of an unusually compelling nature, and (2) situations of extreme and patent mental or physical disability such that a jury would likely be offended by the prosecution.

Since this Division is not staffed to process a large number of referrals, we anticipate asking Selective Service to send the files directly to the appropriate United States Attorneys' offices. We suggest that those offices be instructed to process the cases in essentially the order they are received.

After the passage of our to six months, we should be in a position to measure the impact of the Administration's support for registration and the initial prosecutions. If the rate of non-registration has declined to a manageable figure, we suggest that the Department continue with its current policy of prosecuting all persons who persist in their refusal to register. If, however, non-registration proves to be at a rate which cannot be accommodated by the criminal justice system without an infusion of additional resources in the Executive and Judicial Branches, we suggest that the Department modify its policy as discussed in "II. A." above (Continue Present Policy - Low Option). The exact proportions and details of that modification can best be worked out once the magnitude of non-registration is known.

Our December 31, 1981, memorandum on this same subject to F. Henry Habicht, II, Special Assistant to the Attorney General, is attached.

Jensen Letter 3/2/82 - Exhibit 14b

Typed: 3/2/82

Mr. Herbert C. Puscheck
Associate Director, Plans and Operations
National Headquarters
Selective Service System
Washington, D.C. 20435

Dear Mr. Puscheck:

We received a copy of your February 17, 1982, draft memorandum captioned "Increasing Selective Service Registration Compliance." The memorandum identifies options for improving compliance with Selective Service System registration requirements.

Any enforcement scheme involving Selective Service non-registrants will ultimately result in referrals to the Criminal Division for prosecution. Consequently, we have

prepared the following comments.

Your memorandum contains three primary issues: (deleted)

(deleted)

Since we have a direct and immediate interest in decisions concerning Selective Service's identification of non-registrants, the majority of our comments will address the issue of whether the Service should create an active identification system.

I. PRESENT IDENTIFICATION METHOD

According to your draft memorandum, a passive identification and enforcement program consists of the following: "Friends, neighbors or concerned citizens contact Selective Service and report alleged non-compliance with the registration requirement. Selective Service attempts to verify those reports, contacts the individuals, and if appropriate, refers the cases to

the Department of Justice. 1/

Our experience with the matters referred to us shows that they consist of alleged instances of non-registration which came to the attention of Selective Service because (1) the alleged non-registrants reported themselves, (2) others reported non-registrants, and (3) a newspaper published an article concerning a non-registrant and Selective Service obtained the article.

A. SELF-REPORTING

Those who write to the Service and state that they refuse to register generally fall into two groups: (1) those who refuse because of religious or moral reasons and (2) Those who refuse because of what appears to us to be simple youthful rebellion.

We find that those who write to report their refusal to register generally fall within the category of persons who must

1/ Memorandum at 6.

indeed register. However, several instances have come to our attention in which persons who are not within the registration class have written to the Service expressing their refusal to register. One such person was an eighty-year-old retired minister.

B. REPORTING BY OTHERS

Other instances have come to our attention in which relatives (parents, siblings) have reported the non-registrant. Still other non-registrants have been reported by apparent neighbors as well as by persons writing anonymous letters and making anonymous telephone calls. While the reporting by relatives would seem to be reasonably accurate, the reporting by others is not necessarily so.

Approximately 25 of the referrals to us were reports initiated by an Immigration and Naturalization Service Border Patrol Agent who asked apprehended illegal aliens

whether they had registered with Selective Service. We suspect that none of the aliens are still within the United States. 2/

C. NEWS MEDIA

One person was referred to us after information about his alleged refusal to register appeared in a newspaper.

• • •

If Selective Service has a sufficient address for the alleged non-registrant, it sends him a registered letter. The letter, in polite language, states that the recipient must register or provide information concerning why he is not required to register. In the event that the recipient neither registers nor provides such information, he is told that he will be referred to the Department of Justice for investigation and possible prosecution. If the recipient does

2/ The Immigration and Naturalization Service has not yet responded to our request for information.

nothing or refuses to register, he is referred to us.

If Selective Service does not have a sufficient address for the alleged non-registrant, his file is referred to us in the first instance.

II. DISCUSSION

Our exposure to the referrals shows that in addition to containing names of people within the registration class, they contain apparently fictitious persons as well as people not within the registration class. The incident involving the eighty-year-old retired minister is instructive. He wrote to the Service and stated that he would not register. Since he did not provide a sufficient address, his letter was referred to the Department in the first instance. After the referral reached the Federal Bureau of Investigation, an agent contacted the local police and discovered a three-year-old

speeding violation for a person of the same name. Finding the address for such person, the agent contacted him and learned his age and former vocation. The subject claimed that he had written the letter as part of a national movement by conscientious objectors to express their disapproval of Selective Service registration.

The incident, along with the incidents of referrals of apparently fictitious persons as well as other incidents of referrals of people not within the registration class, demonstrates a waste of valuable Federal Bureau of Investigation resources. We suggest, therefore, that the Service develop a program which (1) verifies that the alleged non-registrant is indeed a member of the registration class, (2) develops and accurate address for the alleged non-registrant, and (3) encourage the alleged non-registrant to register before his file is referred to

the Department of Justice.

There is an even more important objection to the present scheme than that it wastes investigative resources. The present passive identification program is liable to result in adverse judicial decisions based on defendant claims of selective prosecution.

The objective of the efforts of both Selective Service and the Department of Justice is to encourage registration. The first few prosecutions, if successful, are likely to encourage other recalcitrant non-registrants to register. If, however, the first few prosecutions are unsuccessful, compliance with the registration requirement is liable to worsen significantly. Consequently, it is imperative that the initial prosecutions be successful.

Unfortunately, we believe that if the government initiates prosecutions with only the present passive identification scheme

in place, there exists a real risk that the United States will lose at least a few of the initial cases. There is a high probability that persons who write to the Service and that persons who are reported by others are vocal proponents of non-registration. Since a passive identification scheme necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly lead to claims that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights. See United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc). Indeed, with the present univers of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning.

In order to avoid the risk of initial losses of non-registrant cases and the probable consequence of diminishing registrations, we believe that Selective Service must create a program of active identification which will be functioning, or well on the way toward functioning, at the time of the first non-registrant prosecution. The choice of enforcement schemes should be for the Service, but whatever scheme is ultimately implemented should be effective in identifying the preponderance of non-registrants without leaving substantial gaps. 3/

We have examined the options presented in your memorandum. Of those options, it appears that the most effective would be

3/ Your memorandum suggest that "[s]ome jurisdictions have privacy restrictions that could prevent use of their data." Memorandum at 12. We would object to a scheme which was reasonably efficient in identifying non-registrants but which omitted non-registrants in an entire state or two.

developing an active identification program based on the use of social security numbers.

Sincerely,

D. LOWELL JENSEN
Assistant Attorney
General
Criminal Division

(Two pages of handwritten notes)

(See next two pages)

Lippe Memo 3/17/82 - Exhibit 15b

MAR 17 1982

Typed: 3/9/82

Use of Civil Injunctions to Compel Registration with Selective Service

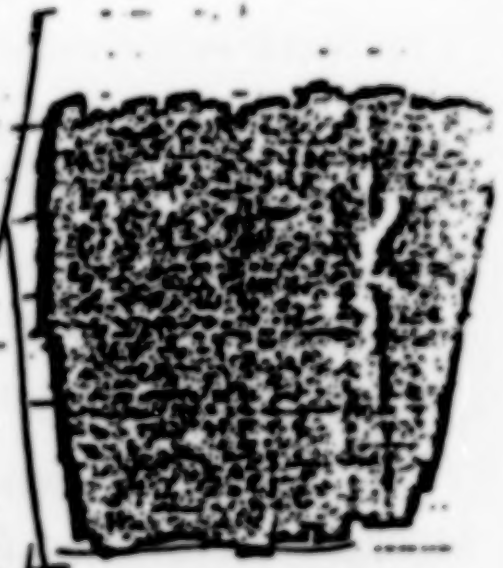
D. Lowell Jensen
Assistant Attorney
General
Criminal Division

Lawrence Lippe, Chief
General Litigation and
Legal Advice Section
Criminal Division

You requested a memorandum concerning whether the government can obtain an injunction which would compel a non-registrant to register with the Selective Service System.

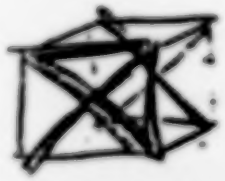
D. Lowell

(draft)



BEST AVAILABLE COPY

(lose)



We conclude that (1) a court is unlikely to grant such an injunction and (2) as a matter of policy, the government should not seek such an injunction.

I. LEGAL ANALYSIS

A. History

(omitted)

II. POLICY ANALYSIS

We believe that seeking civil injunctions against non-registration, even if possible, would be unwise. If we bring such a case and lose, we suspect that the government will pay a high cost in the increased incidence of non-registration. We would then be compelled to bring more criminal prosecutions than might otherwise be the case and to argue against an enhanced selective prosecution claim. 8/

8/ In addition to the usual selective prosecution claim, defendants in other cases (cont.

Even if we obtain an injunction, the result will be troublesome. The action will teach the following lesson. A person can refuse to register and hope to avoid detection. But even if detected, he can continue his resistance to registration and suffer no penalty until after the United States brings an injunction action and the court orders him to register. A policy of seeking injunctions is a policy without general deterrence. Consequently, such a policy is liable to result in increasing numbers of non-registrants even if we win the injunction actions.

III. CONCLUSION

(deleted) such an action is liable to result in ever-increasing numbers of persons refusing to register. Consequently, we recommend that civil injunctions against

8/ (cont.)
will argue that the fact that they are the subjects of prosecutions instead of civil injunctive actions is evidence of impermissible discrimination.

non-registrants not be sought. 9/

9/ Our memorandum does not address the issue of whether an action will lie if a non-registrant is convicted but continues to refuse to register or whether an injunction action should be brought if juries nullify the prohibition in a significant number of cases.

Lippe Memo 3/19/82 - Exhibit 16b

Typed: 3/19/82

Prosecutive Policy in Selective Service Non-Registrant Cases

D. Lowell Jensen Assistant Attorney General Criminal Division	Lawrence Lippe, Chief General Litigation and Legal Advice Section Criminal Division

You requested our views on prosecutive policy now that the grace period for registering with Selective Service has expired. This is an interim memorandum since we do not know (1) the particulars of Selective Service's active system for identifying non-registrants and (2) the incidence of compliance once the Service has identified non-registrants pursuant to the active

program. Until we have some better perspective on the Service's active program and the incidence of compliance with that program, we think it is too early to craft an ultimate prosecutive policy for large numbers of non-registrant referrals.

I. INFORMATIN ABOUT COMPLIANCE PROGRAM

On March 30, 1982, the Military Manpower Task Force endorsed the Service's plan to use social security rolls to identify non-registrants.

Edward A. Frankle, Esquire, Selective Service's Associate Director for Policy Development and Administrative Legal Systems, is endeavoring to create an active program which will enable him to refer identities of non-registrants to the Department of Justice by early October 1982. Social Security, however, has suggested that it may not be able to complete the identification of

males of appropriate age until late summer. Unless Social Security is able to speed its identification, the Service's first referrals of non-registrants identified by computer match can not occur until early 1983. 1/

With such information we are able to suggest a response to two issues facing us: (1) What should we do with the referrals we have already received? (2) What should we tell Selective Service when it wants to make more referrals before fully implementing an active identification program?

II. OUTSTANDING MATTERS

Selective Service has referred 183 matters to us since the beginning of registration. There were people who either reported themselves as not having registered or who were reported by others. A number of Mennonites, who historically have been reluctant to

1/ Selective Service is counting on strong White House support to hasten Social Security's providing assistance.

comply with Selective Service requirements, and others with religious or moral objections are represented in the "self-reported" referrals. Those who were referred by others are liable to be vocal proponents of non-registration. Thus the initial prosecutions resulting from the Selective Service "passive" enforcement program are liable to appeal least to a prosecutor.

Moreover, the present scheme is liable to result in numerous selective prosecution claims. Since the Service's passive identification system necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly result in allegations that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights.

A way to avoid these problems is to hold prosecution of the "passive identification" non-registrants until the Service is able to identify non-registrants by an active system. Assuming that the "active identification" non-registrant class is so large that prosecution of everyone is impracticable, we could apply the same selection standard to the "passive" referrals as to the "active" referrals. Not only would we avoid some of the "passive" legal problems, we could probably even avoid some of the "passive" prosecutions. Nevertheless, we cannot recommend putting the "passives" on hold until the "actives" are referred. We are precluded from doing so by one factor -- time. If the Department of Justice waits until late this year to institute prosecutions of non-registrants, the registration scheme will suffer greatly. Consequently, we reluctantly conclude that United States Attorneys should be directed

to proceed to prosecution with the matters which have already been referred to them. 2/ We attach a message to United States Attorneys containing such a direction if you agree.

III. MORE SELECTIVE SERVICE PASSIVE IDENTIFICATION REFERRALS

Selective Service is continuing to receive information concerning persons who allegedly have refused to register. It is continuing to process such people in the same manner that it did prior to our suspension of prosecutions and initiation of the grace period. 3/

Since the initiation of the Service's active enforcement program can not be expected in the reasonably near future, we shall continue to receive and process the Service's referrals under its passive

2/ We see no reason to change your August 17, 1981, policy memorandum to all United States Attorneys.

3/ The Service sends registered letters to such persons when it has sufficient addresses.

identification program. No action is required if you agree because the Service expects to continue referring such matters to us.

IV. WHETHER INS SHOULD QUERY REGISTRATION-CLASS ILLEGAL ALIENS CONCERNING THEIR REGISTRATION STATUS

In addition to the foregoing issues, another issue exists for resolution at this time. The Immigration and Naturalization Service contacted us with an inquiry concerning Selective Service System registration. INS wanted to know whether it should ask illegal aliens, who are members of the registration class, whether they have registered with Selective Service.

Illegal aliens, who are the appropriate sex and age, are required to register with Selective Service. Since their status in the United States is illegal, it is probable that they have not registered. Consequently, INS's request creates problems. If

we tell the Immigration and Naturalization Service to inquire of all registration-age, illegal aliens whether they have registered with Selective Service, we may be swamped with information about non-registrant violations. At the same time, we shall not appreciably increase the Nation's military preparedness or foster general deterrence of United States citizen non-registrants. 4/ On the other hand, if we tell INS that we are uninterested in illegal alien non-registrants, we would be creating a huge exception to our enforcement policy. At selective prosecution hearings, the policy will be cast in terms of our prosecuting the "good" citizen 18-year-old for a felony violation while letting the "bad" alien 18-year-old simply return home.

4/ We will not deter United States citizens from refusing to register because the detection method, apprehension by INS agents, is not applicable to United States citizens.

We suggest the following solution. The United States has no interest in prosecuting illegal aliens who are to be returned to their countries without being released from custody. There is no national benefit in having the name of a person in Selective Service's computer when that person is no longer here. However, when an alien will be released within the United States, the country may indeed benefit from registering him. Therefore, we should allow the INS to ask aliens, who will be released from custody within the United States, whether they have registered with Selective Service. If such aliens have not registered, (1) they should be told by INS to register and (2) their names, current addresses, and social security numbers should be referred to Selective Service for inclusion in the Service's enforcement program.

We attach an appropriate memorandum to the INS if you agree.

Typed: 3/22/82

Selective Service Registration of Aliens

Alan C. Nelson,
Commissioner
Immigration and
Naturalization
Service

D. Lowell Jensen
Assistant Attorney
General
Criminal Division

The Criminal Division was informed that the Immigration and Naturalization Service wanted guidance concerning the asking of apprehended illegal aliens, who are within the class of persons who must register with Selective Service, whether they have indeed registered.

We have no need to know the registration status of apprehended aliens who will be returned to their countries of origin without being released from custody. However, the United States should be interested in knowing the registration status of aliens who are apprehended and subsequently, for whatever reason, released from custody within the United States.

If INS wishes to ask appropriate apprehended illegal aliens whether they have registered with Selective Service, INS employees should adopt the following procedure:

1. The failure to register with Selective Service is a federal felony. Therefore, before asking any alien who is in custody whether he has failed to register with Selective Service, an INS employee must advise the alien of his rights pursuant to Miranda v. Arizona.

2. Assuming that the alien is not registered but should be, at the time of his release he should be informed of his registration obligation.

3. The non-registrant aliens's name, address, and social security number, if any, should then be

referred to Selective Service.

General Litigation

Kline (2)

Kline Memo 3/25/82 - Exhibit 17b

Typed: 3/23/82

MAR 25 1982

Active Identification Program Issues

D. Lowell Jensen
Assistant Attorney General
Criminal Division

Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division

On March 16, 1982, a representative from our Section met with Edward A. Frankle, Esquire, Selective Service's Associate Director for Policy Development and Administrative Legal Systems; Henry N. Williams, Selective Service's General Counsel; and the Service's computer programmer. Since the Service has received the approval of the Military Manpower Task Force and the informal approval of the White House, it is moving ahead vigorously with a program

to match its records with social security records. The match should yield the names and social security numbers of the vast majority of non-registrants. 1/ When the Service notified alleged non-registrants, the program will result in a monumental amount of paper work. 2/ Consequently, the Service is reluctant to create either more tasks or more paper work than is absolutely necessary. 3/

Consistent with the Service's desire to reduce tasks and paper work, the Service representatives asked three questions.

1/ The Service will then compare the "matched" list with military rolls in order to identify those who need not have registered. Finally the Service will contact the Internal Revenue Service to obtain recent addresses.

2/ The Service estimates that there are approximately 550,000 men who are required to register but who have failed to do so.

3/ While the Service has been directed to carry out a program of actively identifying non-registrants, it has been given no increase in funds.

(deletion)

(Pgs. 1334 and 1335 of Excerpts omitted.)

(deletion)

We attach a letter which advises Selective Service of our recommendations.

Lippe Memo 3/25/82 - Exhibit 18b

Typed: 3/25/82

25 MAR 1982

Social Security Records Match and (deletion)

Lawrence Lippe, Chief General Litigation and Legal Advice Section Criminal Division	David J. Kline Senior Legal Advisor General Litigation and Legal Advice Section Criminal Division

On March 25, 1982, you asked for my view on whether (deletion) would interfere with Selective Service's matching records with either Social Security or Internal Revenue Service records. As you know, Selective Service intends to match records with Social Security in order to obtain names of non-registrants. Once it has the names, Selective

Service will seek current addresses from the Internal Revenue Service.

I. ACCESS TO SOCIAL SECURITY RECORDS

Selective Service obtains access to Social Security records by operation of section 916 of the Department of Defense Authorization Act, 1982. The Act created a new subsection (e) to 50 U.S.C. App. § 462. The Service now has access to the records if the President authorizes such access.

(deletion)

II. ACCESS TO INTERNAL REVENUE SERVICE RECORDS

Social Security records are not necessarily current concerning address. Internal Revenue Service records, since taxpayers file returns yearly, are more likely to yield current addresses.

Section 6103(i(2) of title 26, United States Code, allows the Internal Revenue Service to supply the name and address of a

taxpayer in response to the request from the head of an agency. The disclosure must be to allow the requesting agency to prepare "for any administrative or judicial proceeding (or investigation which may result in such a proceeding) . . . ." The proceeding must be "pertaining to the enforcement of a specifically designated Federal criminal statute . . . to which the United States or such agency is or may be a party." 26 U.S.C. § 6103(i)(1)(A).

Frankle Letter 5/14/82 - Exhibit 19

SELECTIVE SERVICE SYSTEM
National Headquarters/Washington D.C. 20435

May 14, 1982

Mr. Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division
Department of Justice
Box 887
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Lippe:

Pursuant to our prior discussions, we hereby submit the names of 46 individuals whose cases were previously referred to you for investigation and possible prosecution and who, since then, have registered. A list of these individuals is found as Attachment #1 to this letter. The documentation which supports the fact of registration of the 46 individuals is contained in Attachment #2 to this letter and is forwarded for your information.

In addition to the update information mentioned above, we are also forwarding a list of and the file folders for 103 new referrals. This list is in addition to our previous submissions to you. This new list is Attachment #3 to this letter.

A summary of our current referral status is, therefore, as follows: On July 20, 1981 we referred 134 names. On October 21, 1981 we referred 49 others. On November 16, 1981

we provided the names of 15 previously referred individuals who had registered (Attachment #4). We are now forwarding the names of 46 additional individuals who were previously referred but who registered during the grace period. Therefore, of our earlier referral of 183 names, 61 (15 + 46) have now registered leaving 122 unregistered. In addition, we are now referring 103 cases to you. Therefore, the master list (Attachment #5) contains 225 names.

In accordance with our normal practice, each of the 103 individuals listed in Attachment #3 has been sent a Selective Service letter reminding him of his responsibility to register and apprising him of the penalty for willful failure to do so.

Of the 103 letters sent, 43 were returned to us by the Postal Service as undeliverable. At this time, we have received no response from 54 of the letters that were delivered

and 6 of the addressees responded by writing to us to tell us that they refuse to register.

Thank you for your cooperation and assistance. Let us know if you need anything else concerning the cases. Be assured of our assistance.

For the Directors

/s/
Edward A. Frankle
Associate Director for
Policy Development and
Administrative Legal
Systems

Lippe Memo 5/19/82 Exhibit 20b

Subject

Policy Concerning Prosecution of Selective Service Non-Registrants

Date

MAY 19 1982

To
D. Lowell Jensen
Assistant Attorney General
Criminal Division

From
Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division

Deputy Assistant Attorney General Mark Richard informed us on May 12, 1982, that

we were to prepare a memorandum to all United States Attorneys concerning prosecutions for the failure to register with the Selective Service System. Specifically, Mr. Richard directed us to consider the following five issues:

1. Whether the August 17, 1981, Memorandum to All United States Attorneys concerning prosecutions for the failure to register with the Selective Service System (attached should be revitalized;

(deleted)

3. Whether the Department should institute a policy that severely disabled non-registrants not be prosecuted;

4. Whether the Department should require that prosecutions for counseling violators receive prior Department of Justic approval;

and.

5. Whether the Department should require that prosecutions for non-registration receive prior Department of Justice approval.

Attached please find a proposed memorandum to United States Attorneys. The memorandum would direct United States Attorneys to (1) follow the August 17, 1981, policy memorandum concerning non-registration prosecutions, (2) decline prosecutions of severely disabled non-registrants, and (3) obtain Departmental approval prior to instituting prosecutions of persons for counseling others to refuse registration with the Selective Service System.

We did not direct United States Attorneys (1) to request prior approval before instituting prosecutions or (2) to seek (deleted). Our reasons for not including such items follow.

(deletion)

II. THE DEPARTMENT SHOULD NOT CHOOSE THE FIRST PROSECUTION DISTRICTS

Consideration was given to requiring Department of Justice approval prior to the initiation of any non-registration prosecution. This way the Department could choose the districts in which the first prosecutions would occur.

We believe that such a policy would be unwise. Since the first prosecution will be brought while there are still 550,000 other unprosecuted non-registrants, it is reasonable to expect that the prosecution will be attended by a selective prosecution hearing. The Department will be subjected to severe criticism if we take an active role in determining which district will be the first to prosecute and then have to inform the court, during a selective prosecution hearing, that we chose the district because we expected a

sympathetic forum.

We suggest that even if we take no role in determining the districts in which the initial prosecutions will occur, the first cases will be brought in forums which will be receptive to non-registrant prosecutions. This is so because United States Attorneys and Federal Bureau of Investigation agents in "bad" districts are unlikely to forge ahead while those in "good" districts will. Thus, we should not take an active role in choosing the first districts for prosecution.

• • •

We attach an appropriate memorandum to United States Attorneys.

Lippe Memo 5/21/82 - Exhibit 21

Typed: 5/21/82

Subject

Prosecution of Selective Service Non-registrants

Date
MAY 21 1982

To
D. Lowell Jensen
Assistant Attorney General
Criminal Division

From
Lawrence Lippe, Chief
General Litigation and Legal Advice Section Criminal Division

The attached telegraphic message has been redrafted pursuant to your May 21, 1982, directions.

TELEGRAPHIC MESSAGE

Name of Agency DEPARTMENT OF JUSTICE GENERAL LITIGATION AND LEGAL ADVICE SECTION, CRIMINAL DIVISION

Action:
PRIORITY

Accounting Classification
2B1317

Date Prepared
5/21/82

Name
DAVID J. KLINE

Phone Number
724-7144

TO: MEMORANDUM TO ALL UNITED STATES ATTORNEYS

RE: PROSECUTION OF PERSONS WHO REFUSE TO REGISTER WITH THE SELECTIVE SERVICE SYSTEM

THE GRACE PERIOF FOR THOSE WHO PREVIOUSLY FAILED TO REGISTER WITH SELECTIVE SERVICE EXPIRED ON FEBRUARY 28, 1982.

SELECTIVE SERVICE HAS NOW FINISHED PROCESSING ALL REGISTRATION FORMS COMPLETED DURING THE GRACE PERIOD. ON MAY 14, 1982, IT INFORMED THE DEPARTMENT CONCERNING WHO REGISTERED AND WHO DID NOT OF THOSE PERSONS PREVIOUSLY REFERRED FOR PROSECUTION. WE SHALL SHORTLY INFORM UNITED STATES ATTORNEYS' OFFICES, WHICH HAVE PENDING CASES, OF THIS INFORMATION. IN ADDITION, THE SERVICE REFERRED TO THE DEPARTMENT 103 NEW MATTERS WHICH WE SHALL REFER TO DISTRICTS WHICH HAVE VENUE.

IF A UNITED STATES ATTORNEY IS INFORMED THAT A PERSON REFERRED HAS NOT REGISTERED, HE OR SHE SHOULD DETERMINE WHETHER THE APPROPRIATE STEPS HAVE BEEN TAKEN PURSUANT TO THE AUGUST 17, 1981, MEMORANDUM TO ALL UNITED STATES ATTORNEYS, CAPTIONED "POSSIBLE VIOLATIONS OF THE MILITARY SELECTIVE SERVICE ACT." UNITED STATES ATTORNEYS' OFFICES SHOULD THEN TAKE APPROPRIATE ACTION, INCLUDING

OBTAINING INDICTMENTS AND PROCEEDING TO TRIAL.

NO PROSECUTIONS SHOULD BE INSTITUTED AGAINST PERSONS FOR COUNSELING THE REFUSAL TO REGISTER (50 U.S.C. APP. § 462(a)) WITHOUT PRIOR DEPARTMENT OF JUSTICE APPROVAL. MOREOVER, NON-REGISTRANTS WHO ARE SEVERELY DISABLED SHOULD NOT BE PROSECUTED.

THE GENERAL LITIGATION AND LEGAL ADVICE SECTION AT FTS 724-7144 IS AVAILABLE TO ANSWER QUESTIONS AND RENDER ASSISTANCE. PUBLIC COMMENT, BEYOND INFORMATION CONTAINED IN THIS TELEGRAPHIC MESSAGE, SHOULD BE COORDINATED WITH THAT SECTION.

D. LOWELL JENSEN
ASSISTANT ATTORNEY
GENERAL
CRIMINAL DIVISION

Lippe Memo 6/7/82 - Exhibit 22b

Typed: 6/7/82

June 7 1982

Honorable Stephen S. Trott
United States Attorney
Central District of California
312 North Spring Street
Los Angeles, CA 90012

Re: Prosecution of Persons Who Refuse to Register with the Selective Service System

Dear Mr. Trott:

Our records reflect that matters involving (deletion) and David Wayte were referred to your office as possible violations of 50 U.S.C. App. § 462(a) (failure to register with Selective Service). Our records also reflect that the matters are still pending.

As you know, the grace period for those who previously failed to register with Selective Service expired on February 28, 1982. The Service has now finished processing all registration forms completed during the grace period. It informed us that the above-named persons did not register, at least as late as March 5, 1982.

Please determine whether the appropriate

steps have been taken pursuant to the August 17, 1981, Memorandum to All United States Attorneys, captioned "Possible Violations of the Military Selective Service Act." Your office should then take appropriate action, including obtaining indictments and proceeding to trial.

No prosecutions should be instituted against persons for counseling the refusal to register (50 U.S.C. App. § 462(a)) without prior Department of Justice approval. Moreover, non-registrants who are severely disabled should not be prosecuted.

(deletion)

Please contact us if we may be of any assistance, and please keep us advised of the progress of these matters.

Sincerely,

D. LOWELL JENSEN
Assistant Attorney General
Criminal Division

By:

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section
Criminal Division

Kline Memo 6/9/82 - Exhibit 23

Subject
Original Files Referred From Selective Service

Date
June 9, 1982

To
John McNabb
Special Agent
Federal Bureau of Investigation

From
David J. Kline
Senior Legal Advisor
General Litigation and
Legal Advice Section
Criminal Division

On May 14, 1982, Selective Service delivered 103 new files to the Criminal Division. The files concerned persons who allegedly were required to register with the Selective Service System but who failed to do so.

Enclosed please find 88 of the original files. Our review disclosed that one of the remaining 15 files concerned a person who is apparently a woman and, consequently,

is not required to register. The other 14 files appear to concern illegal aliens. We referred the aliens' names to the Immigration and Naturalization Service and requested information concerning whether the aliens are still in the United States and, if so, what their present addresses are.

(Handwritten addition)

(Also on June 9, 1982, I carried another file to John McNabb. Consequently, I gave him a total of 89 cases today.

On June 10, 1982, we discovered that the problem was that there were only 13 of the May 14 files referred to INS.)

Lippe Letter 6/10/82 - Exhibit 24

Received
San Diego, California
JUN 11 3:03 P.M. '82
United States Attorney
Department of Justice

JUN 10 1982

Honorable Peter K. Nunez
United States Attorney
Southern District of California
San Diego, California 92189

Re: Possible Military Selective
Service Act Violation

Dear Mr. Nunez:

Enclosed are one or more files concerning possible violations in your district of the Military Selective Service Act, 50 U.S.C. App. § 462(a). The original files were created by Selective Service when it learned of names of persons who allegedly were required to register with the Service but who did not. The name or names referred to you have been checked against registrations as late as May 5, 1982.

We also enclose (1) a copy of Criminal Division's prosecutive policy concerning non-registration prosecutions, (2) a general memorandum concerning proof of Selective Service violations, and (3) the appropriate number of special registration forms and

envelopes for use when your office communicates with the alleged non-registrants pursuant to the fourth numbered paragraph of the prosecutive policy memorandum, and (4) a copy of a form letter that Selective Service sent to alleged non-registrants when the Service had sufficient addresses to send such letters (the evidence of a registered letter contained within some of the files concerns the sending of such a form letter).

Please take the necessary steps pursuant to the policy memorandum, including obtaining an indictment or indictments and proceeding to trial.

No prosecutions should be instituted against persons for counseling the refusal to register (50 U.S.C. App. § 462(a)) without prior Department of Justice approval. Moreover, non-registrants who are severely disabled should not be prosecuted.

Please contact us if we may be of any assistance, and please keep us advised of the progress of the matter or matters.

Sincerely,

D. LOWELL JENSEN
Assistant Attorney General
Criminal Division

By: /s/

LAWARENCE LIPPE, Chief
General Litigation and Legal Advice Section
Criminal Division

Telegraphic Message 6/14/82 - Exhibit 25

Name of Agency

General Litigation and Legal Advice Section, Criminal Division

Accounting Classification
2B1317

Date Prepared
6/14/82

Name
David J. Kline

Phone Number
724-7144

TO: MEMORANDUM TO ALL UNITED STATES ATTORNEYS

RE: PROSECUTION OF PERSONS WHO REFUSE TO REGISTER WITH THE SELECTIVE SERVICE SYSTEM

UNITED STATES ATTORNEYS SHOULD BE IN RECEIPT OF LETTERS CONCERNING PERSONS IN THEIR DISTRICTS WHO ALLEGEDLY WERE REQUIRED TO REGISTER WITH THE SELECTIVE SERVICE SYSTEM BUT WHO FAILED TO DO SO. OUR RECORDS REFLECT THAT APPROXIMATELY HALF OF ALL DISTRICTS SHOULD NOW HAVE ACTIVE NON-REGISTRANT MATTERS.

REGISTRATION WITH THE SELECTIVE SERVICE SYSTEM BEGAN NEARLY TWO YEARS AGO ON JULY 21, 1980. THE GRACE PERIOD FOR LATE REGISTRATIONS EXPIRED FEBRUARY 28, 1981. ALTHOUGH THE SERVICE ONLY RECENTLY REFERRED TO THE DEPARTMENT OF JUSTICE THE RESULTS OF ITS GRACE PERIOD REGISTRATION CHECK AS WELL AS 103 NAMES OF OTHER POSSIBLE NON-REGISTRANTS, WE ARE CONCERNED THAT ANY SIGNIFICANT DELAY IN INSTITUTING PROSECUTIONS WILL IMPACT ADVERSELY ON THE REGISTRATION SCHEME AND

RESULT IN AN INCREASE IN NUMBERS OF PERSONS WHO REFUSE TO REGISTER. CONSEQUENTLY, WE REQUEST THAT UNITED STATES ATTORNEYS ASSIGN ANY NON-REGISTRATION MATTERS IN THEIR DISTRICTS TO EXPERIENCED ASSISTANT U. S. ATTORNEYS AND ENSURE THAT SUCH MATTERS ARE HANDLED ON A PRIORITY BASIS.

IF THE NON-REGISTRATION MATTERS PENDING WITHIN YOUR DISTRICT CAN BE SUFFICIENTLY INVESTIGATED WITHIN A SHORT PERIOD OF TIME, INDICTMENTS SHOULD BE SOUGHT BEFORE THE END OF JUNE.

IN THE EVENT THAT YOUR DISTRICT IS ABLE TO SEEK SUCH INDICTMENTS NOTICE SHOULD BE GIVEN TO THE GENERAL LITIGATION AND LEGAL ADVICE SECTION AT FTS 724-7144 BEFORE RETURN OF THE INDICTMENTS.

D. LOWELL JENSEN
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Jensen Memo 6/29/82 - Exhibit 26b

JUN 29 1982

Typed: 6-28-82
Retyped: 6-29-82

Prosecution of Selective Service Non-Registrants

The Attorney General

D. Lowell Jensen
Assistant Attorney General
Criminal Division

This memorandum concerns the prosecution of persons who fail to register with the Selective Service System in violation of 50 U.S.C. App. § 462(a).

I. PRESENT POSTURE

The grace period for late registrations, which was announced by the White House on January 7, 1982, ended February 28, 1982. Three months later, on May 14, 1982, the Selective Service System informed the Criminal Division concerning who among its 183 referrals in the Fall of 1981 registered and wo did not. Also on May 14, 1982,

the Service referred 103 new matters to us involving persons who may have violated the non-registration prohibition. After reviewing all the matters, including those referred in the Fall of 1981, and removing matters that warranted no further action, we forwarded 159 matters 1/ to United States Attorneys Offices for investigation and possible prosecution. (See Tabs A and B for draft referral letters. See Tab C for districts in which non-registration matters are pending.) Since registration began nearly two years ago on July 21, 1980,

1/ The 159 matters were composed of 70 matters which had been referred in the Fall of 1981 and 89 new matters. The matters which were not referred to United States Attorneys involved persons who (1) had registered, (2) were not within the class which had to register (too old, women, fictitious names) (3) could not be located, or (4) were apparent illegal aliens. The aliens were referred to the Immigration and Naturalization Service so that we could determine whether they were still in the United States and, if so, what their present addresses are.

since there are approximately 527,000 non-registrants, and since the grace period expired four months ago, we are concerned that a significant delay in instituting prosecutions will result in an increase in the number of non-registrants and, consequently, will impact adversely on the registration program. Therefore, we recently sent a teletype message to all United States Attorneys in which we requested that non-registration matters be assigned to experienced Assistant U.S. Attorneys and handled on a priority basis. (Tab D.)

II. PRESENT PROSECUTIVE POLICY

Our prosecutive polis for Selective Service non-registrant violations is contained in an August 17, 1981, memorandum to all United States Attorneys. (Tab E.) Our policy requires that United States Attorneys notify non-registrants by registered mail and inform them that unless they

register within a specified time, prosecutions will be considered. 2/ In most, if not all, instances, we anticipate that a Federal Bureau of Investigation agent will also interview alleged non-registrants prior to the initiation of prosecutions. Nevertheless, if a non-registrant registers prior to indictment, no further prosecutive action will be taken.

Our policy is designed to ensure that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted. The negative aspect of the policy is that if it becomes public, its provisions may act as a disincentive, until the last

2/ Consistent with our request for priority handling of non-registrant matters, we have suggested to United States Attorneys' offices which telephone the Division that they may wish to use Federal Bureau of Investigation agents to deliver the letters and interview non-registrants at the time of delivery.

possible moment, to registration. 3/

III. EXPECTATION AND FUTURE POLICY

Selective Service's enforcement program is presently "passive". Non-registrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register. The former are liable to be sympathetic defendants; the latter are liable to raise thorny selective prosecution claims. (deletion) . 4/

3/ We have so far resisted releasing the policy memorandum under the Freedom of Information Act. One FOIA suit has been filed.

Since there is an inordinate amount of news media interest in Selective Service non-registrant prosecutions, we are preparing appropriate guidance for United States Attorneys. (Tab F.)

4/ Our information indicates that the first indictment will probably name Benjamin H. (cont.)

Fortunately, the Service now has access to Social Security records and has nearly implemented an "active" enforcement program. 5/ Thus, we can anticipate a continuing trickle of names discovered pursuant to the Service's "passive" enforcement program, and, if the Service can fully implement its "active" enforcement program, we can anticipate the referral of massive numbers of non-registrants. In the latter event, we shall create an appropriate selection criterion, most probably one based on randomness.

4/ (cont.)
Sasway as defendant. Mr. Sasway seems to be a moral objector. From the information we possess, he does not appear to be a person who will be too sympathetic a defendant. (Tab G.) However, the Criminal Division has refrained from targeting any particular individuals for the first or subsequent prosecutions.

5/ Selective Service had intended to use Internal Revenue Service records to obtain current address information on non-registrants. (deletion) (Tab H.)

Benjamin H. Sasway
804 Ora Avo Drive
Vista, CA 92083
July 24, 1980

President Jimmy Carter
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing you this letter today, the day I'm supposed to register for the draft, as a symbolic statement of my opposition to all military conscription. This letter serves the dual purpose of the American Armed Forces and the problems they're having getting qualified recruits.

I feel compelled by my conscience to state honestly and openly that I am not registering for the draft. I am obligated to protest even simple registration since I feel the spirit of this mandate, like the actual conscription, is amoral and incompatible with a free society. Furthermore, I

cannot allow myself to be forced into a military establishment that is too misdirected and too conservative to serve the country's best interests.

The assumption and underlying spirit of draft registration is that the draft is O.K. if the world situation gets bad enough to warrant its use (i.e. increasing world tension or all out war). I am opposed to military conscription no matter what the world situation is like. Consequently, I am opposed to draft registration and the spirit in which it is used. I must protest draft registration just as I would protest the actual draft.

I strongly believe that draft registration is morally wrong, unjustified in the spirit of the United States Constitution, and more generally, incompatible with a truly free society. It is wrong to make law abiding citizens do anything against their

will, especially if it is to learn to kill. To deprive people of their basic rights, freedom to be who they want to be, is a callous erosion of the American Constitutional Heritage. Our society should, year by year, improve, expand, and equalize these traditional freedoms, not systematically take them away.

My second major reason for refusing to register is that the military just isn't doing its job and that I couldn't trust it to use my life effectively to defend our country. I love my country and would defend it in a time of crisis.. Under the current circumstances, however, I could easily be doing a job that is hardly defense oriented. The reason for this is that the military is not really interested in just defending our country. I seems equally important to the Pentagon that military forces also defend business interests abroad, and antiquated

Soviet containment Policy, the mythical American Honor, and just generally the military status quo. These are not natural extensions of American defense. These are wrong, and I cannot allow myself to be a tool to such misdirection. So, I cannot allow myself to be conscripted.

The draft is such an important issue at this point because the military cannot fill its quotas with qualified men and women. It is important, therefore, to look at the reasons these quotas aren't filled and why many people don't want anything to do with the Armed Forces. It is helpful in this discussion to look at two major reasons why a person might want to join the military. The first general reason is to get the material benefits that the Armed Forces have to offer. The second reason is, for lack of a better word, the spiritual benefits of the military, the honor and pride of defending one's country

I am sorry to say that the military falls short of catering to either of these needs. The best way to eliminate the necessity for having a draft is to make people want to join the military.

The Armed Forces recruiters have done the best job of enticing young people to become recruits when they have presented the material benefits, i.e., money, educational benefits, etc.. The educational benefits are actually quite good. The basic pay, however, is substandard, especially when compared to equable jobs in the civilian world. I've heard career people in the services say that they stay in the military in spite of the pay. Many others, however, are not re-enlisting and are choosing jobs in the civilian world when they feel they can support their families better by doing so. This wage inadequacy is a grave mistake especially when it deters the most needed

personnal, those with technical skills, from re-enlisting. The easiest step toward filling the military quotas, with people that are motivated by the benefits, is to make wages adequate for supporting a family and living a decent life.

People who are financially secure and have access to an education are much harder to get to join the Armed Forces for the obvious reason that their basic physical needs are met. Some of these people would join the military just to have the satisfaction of knowing they have served their country by helping defend it. Such people, myself included, are easily discouraged, especially in view of today's military. Special effort should be made to keep these people from becoming discouraged since they can contribute to filling the ranks and thus dispelling the contrived need for a draft. Several obstacles are standing in the way

of this, however.

People aren't serving their country by joining the military for many of the same reasons I oppose registration and the draft. Most important of these is the military misdirection mentioned above. People today cannot be secure in the knowledge that they are joining the military to defend their country. It is just as likely they would be put to defending someone else's country, or even worse, someone else's natural resources. To many, like myself, meaning in life is very important. Some of us are worried that our lives might be wasted in Afghanistan by an overjealous leader, just as lives were wasted a generation ago in Viet Nam.

To cure this fear the American Military must be re-aligned so it is certain that recruits won't fight needless wars and that their primary purpose is defending the United States. The way to do this as I see it is to

restructure the military system so that it is not offense, weaponry oriented. It is ridiculous to expect anyone in this country to believe, let alone the rest of the world, that our efforts for world peace are genuine with such sophisticated assault capabilities. I believe that the millions spent on offensive weapons should be drastically cut and put instead into areas that are defense oriented, pay raises and domestic defense (the reserve and coast guard). Only then can recruits be sure that their lives won't be wasted needlessly.

Another major obstacle that is keeping people from joining the military to reap the spiritual benefits is the detrimental effect the military can have on a person's personality. One can expect upon joining a branch of the Armed Forces, to be stripped of all individuality and personal dignity in the name of discipline, discipline that

necessarily beneficial. Recruits are fed into a giant military machine to emerge wearing the same clothes, having the same hair cut, and thinking and acting the same as thousands of other recruits. A person's identity is too important to sacrifice needlessly, especially for a military that is not necessarily doing anybody any good.

It is very possible to defend our country without sacrificing one's individuality. It is also as possible to train to defend one's country in a sweat suit or warm up suit as it is in the olive drab army issue. Perhaps a creative look at military regulations to determine which ones are actually needed for an efficiently working system would be helpful now. If it allows more freedom, it will get more recruits.

The third and final obstacle which is keeping people from joining the military is the fact that people lose control over

their own lives. Some are reluctant to join when they will be deprived of the choice as to where to live and what job to do. The final decision about what a person is going to do and where he or she is going to do it, as well as many other important personal decisions, are made by superior officers who may have little regard for the recruit's wishes. To get people to join the military they must have some control over their personal decisions. I feel this can be accomplished in a way that is also helpful to the other solution stated above.

I have already expressed the need to reaffirm the country's dedication to peace through the re-alignment of military aims and means of making warfare. In keeping with this, I am convinced that the best way to defend the domestic United States is not through highly centralized, military bases which can be wiped out with a couple well

placed bombs (although this is the best way to fight a foreign war). I feel a better way would be to distribute self-sufficient localized groups evenly across the country much like a militia. These "county militias", still actually responsible to a centrally located headquarters like the Pentagon, could be more able to defend the country since it would respond to trouble quickly, wherever it occurred.

It would be a source of local pride for a community as its citizens get envolved in the defense of their livelihoods. Because these so called "county militias" would be widespread, persons could transfer from place to place and still be able to participate. Furthermore they would be run efficiently on a sophisticated reserve level enabling people to have outside lives beside their military duties. Such reserve bodies could be located by sources of large

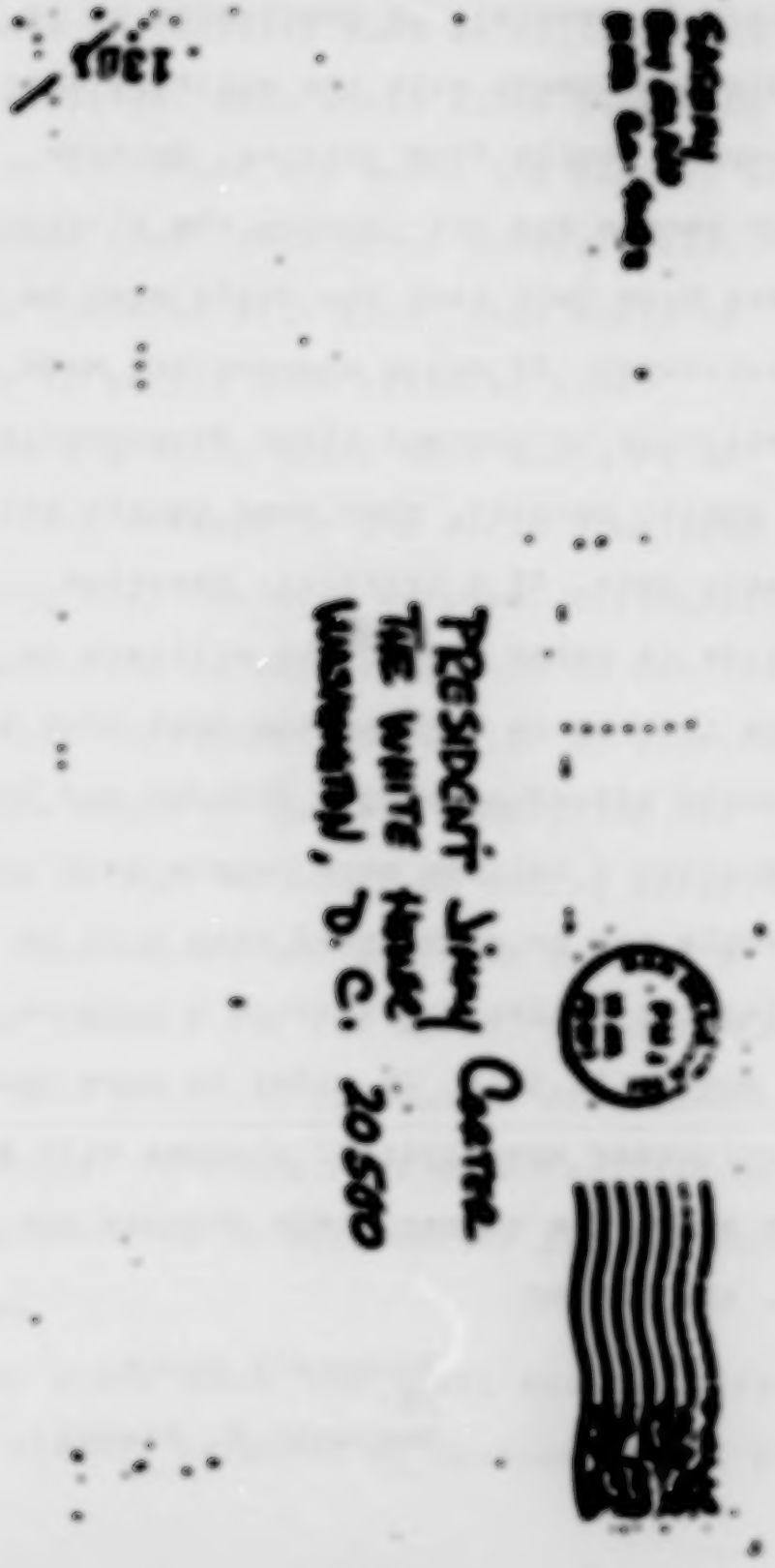
numbers of recruits such as colleges and universities. This would allow people to get an education and serve the country at the same time. Then after several years, being finished with both, they would be ready to settle into civilian life.

On a greater scale this would be an important message to the world I believe, showing that our main purpose, militarily, is defending ourselves and not to enforce our will throughout the world. By eliminating the means of quickly committing the nation to war, we would be making ourselves more trustworthy and would be setting a better example for the world. We would be in a good position to promote disarmament worldwide. In these ways decentralization would prove to be much better for the United States.

My views about the draft and registration closely parallel my opinions about the

military in general. In conclusion it is the disenchantment with the military that is keeping people from joining. Because enough people are not joining the military, leaders have felt that the draft must be re-instituted. If major changes are made in the military to correct these divergencies from public opinion, then some people will probably join. If a critical, creative attitude is taken toward the military to insure that it is working the best that it can while affording people freedom and individuality I believe more people will join. If people can be guaranteed they will be defending our nation and serving a purpose, then more will join. In order to save the all volunteer army system, changes will have to be made. The sooner these changes are made, the better.

Sincerely yours,
/s/
Benjamin H. Sasway



BEST AVAILABLE COPY

Benjamin H. Sasway
804 Ora Avo Drive
Vista, CA 92083

June 30, 1981

Henry W. Williams
General Council
Selective Service System
Washington, D.C. 20435

Dear Mr. Williams

You are correct in your letter, dated June 17, 1981. that I was required to register for the draft. I have not done so and I cannot.

Almost a year ago, the dat I was suppose (sic) to register, I sent a letter to President Jimmy Carter stating my moral objections to draft registration and the actual draft. Enclosed is a copy. In it I detail why I think there is ethically little difference registration and an actual draft and why both are abhorent affronts to freedom. The bottom oine is that I cannot go against my conscience even when faced with the

possibility of fine or imprisonment. These sentiments I still feel today, especially when the present Administration is threatening another Viet Nam type war in El Salvador. I must perform to the dictates of my conscience.

Sincerely,

/s/

Benjamin M. Sasway

Kline Letter 7/7/82 - Exhibit 27b

TYPED: 7-1--82

(Deleted)

Re: (deletion) Alleged
Selective Service Counseling Violations

Dear (deleted)

By letter dated June 17, 1982, you requested authority to prosecute (deleted) for allegedly counseling others to refuse to register with the Selective Service System. You previously wrote to us on December 31, 1981, concerning (deleted.) Although we prepared a reply, see enclosed copy, we are unable to find either the original or evidence that it was sent to your office. Please accept our apologies for the vicissitudes of the Department's mail handling.

In your latest latter, you note that an article appeared in the (deleted) which told of (deleted) history of convictions for

Selective Service violations and assault on a federal officer in connection with his draft resistance. The article quoted him as claiming that he is presently counseling others not to register with Selective Service. You also said that Mr. Beyer heads an organization called "Upstate Resistance," and you included copies of material provided by that organization. Finally, you suggested that since (del.) is "certainly much more mature than the average 18 and 19 year olds he is counseling not to register," he should be prosecuted before non-registrants are prosecuted.

Although we do not know the particulars of (del.) alleged counseling violations, we suspect that the information now known to your office generally consists of his letter and public statements. The essence of his letter and, we suspect, his public statements is as follows:

> Today, in violation of the United States Criminal Code . . . I have once again encouraged young men to violate federal regulations which force them to register with the Selective Service System. I have actively counseled, and am willing to aid and abet any young man who chooses the path of resistance to draft registration.

If our suspicion is correct, then an investigation into his alleged violations would necessarily mean contacting members of his (del.) organization and interviewing them concerning (del.) counseling violations. We further suspect that the group will prove resistance to the investigation, possibly compounding even further the first amendment problems which will undoubtedly arise in a non-registrant counseling prosecution.

Public attention will be focused on the

first several non-registrant prosecutions. Consequently, our primary concern is that such prosecutions be successful. A loss and its attendant publicly in a non-registrant counseling violation case will not only encourage others to counsel non-registrants but will probably encourage persons of registration age simply to refuse to register. Therefore, we prefer that United States Attorneys first bring non-registrant prosecutions and, through successfully prosecuting such cases, establish that the government believes that the failure to register is a serious matter. After the first few successful non-registrant prosecutions, United States Attorneys can then tackle non-registrant counseling violations with the possibly troublesome first amendment issues connected with such violations.

In short, we suggest that you first bring several successful non-registration

prosecutions in your district. Then, if (del.) is found counseling non-registrants to violate the law, he should be prosecuted. Please note that even then, counseling violations under 50 U.S.C. App. § 462(a) require the Department's approval before they are brought.

Sincerely,

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section
Criminal Division

BY:

DAVID J. KLINE
Senior Legal Advisor

Enclosure

Jensen Memo 7/9/82 - Exhibit 28b

Subject: Prosecution of Selective Service Non-Registrants

Date: JUL 9 1982

To: United States Attorneys (Mid-Sized Offices)

From: D. Lowell Jensen, Assistant Attorney General, Criminal Division

This memorandum concerns the prosecution of persons who fail to register with the Selective Service System in violation of 50 U.S.C. App. § 462(a).

The grace period for late registrations, which was announced by the White House on January 7, 1982, ended February 28, 1982. Three months later, on May 14, 1982, the Selective Service System informed the Criminal Division concerning who among its 183 referrals in the Fall of 1981 registered and who did not. Also on May 14, 1982, the Service referred 183 new matters to us involving persons who may have violated the non-registration prohibition. After reviewing all the matters, including those referred in the Fall of 1981, and removing matters that warranted no further action, we forwarded 159 matters in early June to United States Attorneys Offices for investigation and possible prosecution.

Since registration began nearly two years ago, since there are approximately 527,000 non-registrants, and since the grace period expired four months ago, we are concerned that a significant delay in instituting prosecutions will result in an increase in the number of non-registrants and, consequently, will impact adversely on the registration program. Therefore, we have asked that non-registration matters be assigned to experienced Assistant U.S. Attorneys and handled on a priority basis.

Our prosecutive policy requires that United States Attorneys notify non-registrants by registered mail that, unless they register within a specified time, prosecutions will be considered. In most instances we anticipate that Federal Bureau of Investigation agents will also interview alleged non-registrants prior to the initiation of prosecutions. Nevertheless, if a non-registrant

registers prior to indictment, no further prosecutive action will be taken.

The policy is designed to ensure that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted. • impt [handwritten] The negative aspect of the policy is what if it becomes public, its provisions may act as a disincentive, until the last possible moment, to registration. Consequently, we request that United States Attorneys refrain from publicly disclosing policy concerning Selective Service non-registrant prosecutions.

Selective Service's enforcement program is presently "passive". Non-registrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious

and moral grounds and (2) persons who publicly refuse to register. The former are liable to be sympathetic defendants; the latter are liable to raise thorny selective prosecution claims. (Deletion.)

Fortunately, the Selective Service System now has access to Social Security records and has nearly implemented an "active" enforcement program. Thus, we can anticipate a continuing trickle of names discovered pursuant to the Service's "passive" enforcement program, and, if the Service can fully implement its "active" enforcement program, we can anticipate the referral of massive numbers of non-registrants. In the latter event, we shall create an appropriate selection criterion, most probably one based on randomness. •for Active [handwritten] "Based on Randomness" [handwritten]

We attach papers which are both significant and pertinent to Selective Service non-registrant prosecutions. They are arranged

in chronological order.

Attachments

Lippe Memo 7/14/82 - Exhibit 29b

Prosecution of Selective
Service Non-Registrants JUL 14 1982

D. Lowell Jensen
Assistant Attorney
General
Criminal Division

Lawrence Lippe, Chief
General Litigation and
Legal Advice Section
Criminal Division

You requested information which you could use to brief the Attorney General concerning the prosecution of Selective Service non-registrants. 1/

There are now two indictments returned against alleged non-registrants. On June 30, 1982, a grand jury in the Southern District ofCalifornia returned an indictment against Benjamin H. Sasway. Trial is scheduled for August 24, 1982. On July 13, 1982, a grand jury in the Western District of Virginia

1/ For general background material, attached please find a copy of the Division's June 29, 1982, memorandum to the Attorney General. (Tab A).

returned an indictment against Enten Eller. Mr. Sasway appears to object to registration on moral grounds. Mr. Eller appears to object on religious grounds. 2/ Both alleged non-registrants are reported to be college students.

The Criminal Division has played no role in choosing these cases as the first two. While we shall continue to urge United States Attorneys' offices to proceed with the investigations and prosecutions, we shall refrain from urging that any particular matter be placed ahead of any other matter.

We tentatively expect an indictment to be returned on July 19, 1982, in the Northern District of Ohio. The expected defendant is a Mennonite seminary student. On or about July 21, 1982, we anticipate that an indictment will be returned in Los Angeles.

2/ Conscientious objector status becomes relevant only when there is an induction. It is no defense to a charge of failing to register.

(Not legible)
program is presently "passive." Non-registrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register. The former are liable to be sympathetic defendants; the latter are liable to raise thorny selective prosecution claims. (Deletion)

(Deletion)

Attachments

Ligge Letter 7/23/82 - Exhibit 30b

T: 7-22-82

JULY 22, 1982

(Deletion)

Re: Selective Service Non-Registrant Prosecutions

Dear (deleted)

(Contents of Excerpts page 1373 deleted.)
(Also, approximately one-half of page 1374 is deleted.)

II. Selective Prosecution Problem

We are disturbed by your perception of how the prosecution of (dele.) surnamed persons in your district will be perceived. Nevertheless, your letter may raise broader issues impacting on the prosecution of non-registrants throughout the nation. Would the declination of prosecution be viewed as discrimination in favor of persons of a particular national origin? Would others perceive such declinations as discriminating against citizens and in favor of aliens? Fortunately, we believe that we need not now face the issues. Our experience shows that a large number of persons, when faced with the actual prospect of registering or being prosecuted, prefer to register.

Paraticularly in the case of those who wish to remain in the United States, registration may look like the better alternative. Consequently, it is premature for us to confront the apparent choice of possibly causing problems in your district or possibly causing problems in the nationwide effort to enforce the prohibition against failing to register with the Selective Service System.

We suggest that you take the appropriate steps pursuant to the Division's August 17, 1981, policy memorandum, a copy of which is enclosed. In the event that those steps do not result in the non-registrants' registering, at your request we will review the larger issues and your policy preferences.

Sincerely,

D. LOWELL JENSEN
Assistant Attorney General
Criminal Division

BY:

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section

Enclosure

T: 7-23-82
RETYPED: 7-30-82 6 AUG 1982

25-35-1310

(Deleted)

Re: Alleged Selective Service Non-Registrant

Dear (dele.)

By letter dated July 7, 1982, you recommended that we authorize the declination of prosecution against (dele.) You noted that (dele.) in his letters to Selective Service and to others, had supplied all the information needed for registration except for his social security number and date of birth. (Dele.) subsequently gave his birth date to a Federal Bureau of Investigation agent when the agent interviewed him. You suggested that, but for the failure to provide his social security number, (dele.) "would be deemed to have registered constructively."

You then noted that the "Justice Department

represented to the Court of Appeals [in the case of Wolman v. United States] that those registrants who refuse to disclose their social security numbers would not be prosecuted for failure to register, provided that they had otherwise complied with the law." You then suggested that a district court or a court of appeals might "view a prosecution of Mr. Brumbaugh as a violation of the spirit, if not the letter, of the Department's stated policy."

In light of these considerations, you recommended that the prosecution of (Dele.) be declined.

I. Wolman v. United States

We enclose a copy of the Criminal Division statement of policy which was filed in the court of appeals in the Wolman case. Before we submitted a statement to the Civil Division, we anticipated the issue you raise in your letter. Consequently, we drafted the

statement to read, in pertinent part, that,

> Assuming that the Defense Authorization Act . . . passes with a provision concerning the use of social security numbers in registering persons [see 50 U.S.C. App. § 462(e)], the Criminal Division will not prosecute persons who previously complied with all Selective Service regulations and procedures except for providing their social security number on registration forms until the Selective Service gives such persons an opportunity to provide that number under the terms of the new statute.

(Emphasis added). (Dele.) did not fill out a form and, therefore, plainly does not fall within the perimeters of the Division's statement to the court.

II. Constructive Registration

Since (dele.) actions fall outside the Division's Wolman policy, and since he has not supplied all the information necessary for registration, it follows that he cannot have constructively registered. Nevertheless, even if (dele.) had supplied his social security number to the Federal Bureau of Investigation, we would be reluctant to construe his actions as a constructive registration.

The genesis of constructive registration cases appears to be United States v. Norton, 179 F.2d 527 (2d Cir. 1950). In that case, the only proved failure of the defendant was the failure to sign the registration card. Since Selective Service regulations required the registrar to sign the registrant's name in the event that the registrant proved recalcitrant, the court found that the prosecution failed to prove a failure-to-register case.

Selective Service's present registration regulations are contained in 32 C.F.R. Part 1615. Those regulations do not provide for the registrar's completing the registration card and signing the registrant's name. Consequently, we doubt that constructive registration continues to be a viable defense. 1/

In any event, since (dele.) provided some of the registration information to an FBI agent, such information is not appropriate for constructive registration. See United States v. Heiss, 357 F.Supp. 1337, 1340 (S.D.N.Y. 1972), aff'd, 478 F.2d 338 (2d Cir. 1973).

III. Religious Beliefs

We note that (dele.) appears to hold sincere religious beliefs which he asserts preclude him from registering. If he is prosecuted, his case is liable to prove

1/ (Deleted.)

quite difficult. Consequently, we are not unsympathetic to your request for declination authority.

Let us assume that we wanted to create a policy which would allow declinations of religious objectors. The difficulty is that the Department of Justice and the United States Attorneys' offices have no way to distinguish the sincere religious objector from those who are insincere; we have neither an established review procedure nor the desire to probe anyone's religious beliefs. Without such a review procedure, a policy predicated on sincerity of beliefs would be impossible to apply even-handedly throughout all the judicial districts in the United States.

Fortunately, the Department has already determined that religious beliefs must be irrelevant to a determination whether or

not to prosecute. 2/ See U.S. Department of Justice, Principles of Federal Prosecution 14 (1980). If, as we must, we subtract (dele.) religious beliefs from the matter, we see no reason for excluding him from the group of non-registrants who should be prosecuted.

We realize that the prospect of prosecuting young men, who otherwise seem to be scrupulously law abiding and who claim that they are motivated by sincere religious objections, is not necessarily attractive. Such prosecutions, as well as prosecutions of other individuals who continue to refuse to register with Selective Service for different reasons, are simply the natural result of instituting cases when religion is

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2/ Sincerity of religious or other beliefs will most likely become relevant to Selective Service classifications in the event of the initiation of inductions. See 47 Fed. Reg. 4643 et seq. (Feb. 1, 1982).

irrelevant. We note in this connection that there are other United States Attorneys' offices which have instituted and will have to institute prosecutions of religious objectors.

IV. Conclusion

For the reasons stated above, we regret that we are unable to give you declination authority for the matter involving (dele.)

If you have any questions or if we may be of any assistance, please let us know.

Sincerely,

D. LOWELL JENSEN
Assistant Attorney
General
Criminal Division

BY:

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section

Enclosure

Kline Letter 8/25/82 - Exhibit 32b

TYPED: 8-22-82 25 AUG 1982

Honorable Gerald D. Fines
United States Attorney
Central District of Illinois
Post Office Box 375
Springfield, Illinois 62705

Attention: Charlene A. Quigley
Assistant U.S. Attorney

Re: Selective Service
Non-Registrant Prosecution

Dear Mr. Fines:

By letter dated August 13, 1982, you enclosed a copy of a letter you proposed sending to non-registrants in your district. You also raised two questions. First, you inquired about venue in cases in which college students have permanent residence outside the district in which they attend college. Second, you asked whether a person who refuses to register after conviction can be prosecuted a second time.

I. VENUE

(Text [containing fn. 1-4] deleted.)

1/ The court in United States v. Sasway, Criminal Case No. 82-05004-GT (S.D. Cal.), found on August 18, 1982, that the failure to register was a continuing offense.

2/ Presidential Proclamation 4771, set out as a note to 50 U.S.C.A. App. § 453.

3/ 50 U.S.C. App. § 462(d).

4/ Presidential Proclamation 4771, § 1-201.

Since there may exist a choice of districts in which prosecutions may be brought, we prefer that cases be brought in the districts which would be most convenient for the defendants, assuming that such prosecutions would not create proof problems. Your district would seem to be the more convenient place for the prosecution of a defendant who would, at the time of indictment, be attending school there.

II. CONTINUING OFFENSE

You also asked the following questions:

> Can a person be prosecuted for continued refusal to register? If not, is he then immune from prosecution for non-induction?

You than stated that, "If there is a legal immunity, it would seem that for many [,]

$10,000 or a short jail stay is a small price to pay to avoid military service."

No mandatory induction into the military presently exists. Consequently, even if the failure to register were not a continuing offense, accepting a prosecution and penalty for non-registration could not be equated with avoiding military service.

Nonetheless, in our view the failure to register is a continuing offense. Consequently, a person could be prosecuted a second time if he continued to refuse to register.5/

(Deletion)

III. CONCLUSION

We hope that this letter has been of some assistance to you. We enclose a copy of a memorandum which deals with both venue and the continuing nature of violations under 50 U.S.C. App. § 462.

5/ The offense discontinues at age 26. See 50 U.S.C. App. § 462(d).

Please feel free to call us at FTS 724-7144 if you have any questions or if we may be of further assistance.

Sincerely,

LAWRENCE LIPPE, Chief
General Litigation and
Legal Advice Section
Criminal Division

BY:

DAVID J. KLINE
Attorney

Enclosure

Frankie Letter 9/9/82 - Exhibit 33

SELECTIVE SERVICE SYSTEM

National Headquarters/Washington, D.C. 20421

September 8, 1982

Mr. Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division
Department of Justice
Box 887
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Lippe:

Pursuant to our prior discussions, we

hereby submit the names of 22 individuals whose cases were previously referred to you for investigation and possible prosecution and who have since registered or have been determined to be exempt from the registration requirement. A list of these individuals is found as Attachment #1 to this letter. Documentation supporting the registration of 21 of these individuals is contained in Attachment #2 to this letter and is forwarded for your information.

In addition to the removal from our compliance program of the individuals named in Attachment #1, we have also removed the names of 24 others based on investigation information developed by the FBI and U.S. Attorneys who have received the referred cases. We received this information from your office in May and our files have been updated to reflect this additional information. A list of the persons involved appears as Attachment

#3 to this letter.

In addition to the above removal of 48 persons from our compliance program, we are hereby forwarding to you a list and the file folders for 55 new referrals (Attachment #4). These are new individuals who were processed in accordance with our normal compliance procedures and, as such, all for whom we had a sufficient address and to whom we sent a Selective Service letter reminding them of their responsibility to register and apprising them of the penalty for willful failure to do so. Of the 55 individuals, eight wrote back to Selective Service informing us of their decision not to register; 26 received our letter but did not respond; 18 individual's letters were returned undelivered; and three individuals did not have sufficient addresses to permit a letter to be sent.

Finally, we are enclosing a list of and

updating information on eight individuals whose names have been previously forwarded to you (Attachment #5). In each case, the information consists of a registration of a person with a similar name and other information which may or may not be the person referred to you for investigation. The information is forwarded as an aid to your investigation.

All of the above transactions have been incorporated into one Combined Violators Master List, a new copy of which is enclosed as Attachment #6. This list contains the names of all 179 previously referred persons whose cases are, to our knowledge, still active (225 less 46) plus the 55 new referrals. The new list now reflects a total of 234 cases.

Thank you for your cooperation and assistance. Let us know if you need anything else concerning the cases. Be assured

of our assistance.

For the Director

/s/

Edward A. Frankle
Special Assistant to the
Director for Compliance

Jensen Letter 9/16/82 - Exhibit 34b

TYPED: 8-22-82
RETYPED: 8-26-82 September 6, 1982
RETYPED: 9-8-82

(Deletion)

Re: Selective Service Non-Registrant Cases

Dear (dele.)

This is in reply to your July 20, 1982, letter concerning the prosecution in your district of persons who failed to register with the Selective Service System. You said that your office received approximately sixteen Selective Service matters and that fourteen remain active. You requested that an attorney from the Department of Justice

be assigned temporarily to prosecute the cases. You stated that you "simply feel it will be impossible for [your] office as presently staffed, to handle these Selective Service cases as priority matters."

We have carefully considered your request as well as the suggestion by Assistant U.S. Attorney (dele.) that military lawyers, instead of Assistant U.S. Attorneys, be used to prosecute these cases in your district.

I. MILITARY PROSECUTIONS

Selective Service non-registrant prosecutions are still sensitive cases. In our view, they require handling by persons experienced in conducting federal criminal cases. A loss or dismissal of a case is liable to have repercussions beyond your district's boundaries. Since military prosecutors are not experienced in district court practice, use of them in these cases will increase the probability of such a loss.

A second problem is one of perception. Putting military personnel in charge of the prosecutions not only links the military directly to the cases but also may be construed as signaling that the Department of Justice and United States Attorney's Office think that the matters are not important enough to warrant using their own resources.

Consequently, we conclude that military personnel should not be used to prosecute these cases.

II. DEPARTMENT OF JUSTICE PROSECUTORS

We regret that we are also unable to agree to your request that this Division supply prosecutors to handle your non-registrant cases.

This Division is simply not in a position to assume responsibility for Selective Service non-registration cases which have been, or will be, referred to your district or to any other district. We have already

committed substantial resources during the past 18 months to the development and initiation of enforcement policies and procedures related to non-registration. The Division is continuing to devote resources, providing support whenever needed to Assistant U.S. Attorneys who are handling individual cases. For example, we are prepared to assist your office with the preparation of responses to motions, voir dire questions, jury instructions, etc. This should substantially lessen the amount of time which your office will have to expend in handling these cases. We believe that this is the most effective utilization of the Division's resources.

When we requested United States Attorneys to assign non-registration matters to experienced Assistant U.S. Attorneys and ensure that such matters are handled on a priority basis, we realized tha the non-regristant matters would compete with other

pending cases. In the event of such competition, the non-registrant matters should be accorded the same treatment which a U.S. Attorney's office gives to its highest priority cases.

III. CONCLUSION

Prosecution of non-registrants is necessary to deter people from refusing to register. Consequently, prosecutions are essential to the success of the registration system. We therefore request that your office move forward with those pending non-registrant matters.

In the event your Assistant U.S. Attorneys wish to obtain assistance in the development of litigation strategy or in the preparation of legal documents, we will be pleased to supply it.

Sincerely,

D. LOWELL JENSEN
Assistant Attorney
General
Criminal Division

Lippe Memo 9/28/82 - Exhibit 35b

Subject

Selective Service Non-Registrant Prosecutions

Date
SEP 18 1982

To
D. Lowell Jensen
Assistant Attorney
General
Criminal Division

From
Lawrence Lippe, Chief
General Litigation
and Legal Advice
Section
Criminal Division

You requested a briefing paper concerning cases against persons who refuse to register with the Selective Service System.

There have been eleven indictments (one is sealed) returned against non-registrants.1/ Two cases have gone to trial; one was a bench trial in the Western District of Virginia and the other was a jury trial in the Southern District of California. Both cases ended in guilty verdicts. There has been one selective prosecution hearing which ended successfully for the Government. The

1/ The districts in which indictments have been returned are set out in Tab A.

case in the Northern District of Ohio is scheduled for trial on September 30, 1982, and the case in the Central District of Californis is scheduled for trial on October 12, 1982. We anticipate another indictment in Boston within the next two weeks.

I. POLICY

Our policy requires that United States Attorneys notify alleged non-registrants by registered mail that, unless they register within a specified period of time, prosecutions will be considered. In most instances, the Federal Bureau of Investigation agents also attempt to interview alleged non-registrants if they continue to refuse to register. Nevertheless, if a non-registrant registers prior to indictment, no further prosecutive action is taken. (Tab B).

The policy is designed to ensure that (1) the refusal to register is willful and (2) only persons who are most adamant in

their refusal to register will be prosecuted.

In addition, we have directed United States Attorneys to handle these matters on a priority basis and to assign them to experienced Assistant U.S. Attorneys. (Tab C).

(Deletion)

III. PENDING MATTERS

In addition to the pending indictments, we have 96 active matters. These are matters in which our files show that the subject, who appears to be within the appropriate class, has failed to register. 4/ The number is inflated since our primary source of information concerning the status ot the matters is the Federal Bureau of Investigation. By the time we receive the reports, approximately a month as passed since the

4/ This number does not include the two persons who have been convicted.

last investigative activity.

The reason that the matters are declined instead of prosecuted is that (1) the non-registrants register when faced with the serious prospect of prosecution or (2) the non-registrants are not within the class of persons who must register. The latter group is composed primarily of persons who were born prior to January 1, 1960, although it is also composed of a substantial number of women.

(Deletion)

IV. NEW REFERRALS

On September 9, 1982, we received 55 referrals from the Selective Service System. One person was previously referred, one had registered, and two were apparently women. Another person filled in the registration card except for his signature, attached the card to a letter which he signed, and said that we could treat the form and letter

however we wished. 4/ Either today or tomorrow we shall refer the remaining 50 matters to the appropriate United States Attorneys' offices and to the Federal Bureau of Investigation.

V. ACTIVE ENFORCEMENT SYSTEM

Our best information is that the Internal Revenue Service remains unenthusiastic about complying with Selective Service's desire for address information on non-registrants. It recently sent a mailing to non-registrants at the request of the Service, but still insists that it will provde address information to Selective Service on no more than 200 non-registrants.

VI. EFFECT OF PROSECUTIONS

After the first indictments were returned, the Service reported a twenty to twenty-five percent increase in the

4/ We are studying this matter to determine how it should best be handled.

registration rate. This rate has declined to an eight to ten percent increase. We are informed that there was an appreciable increase in registrations when the defendant in the Southern District of California was remanded to custody pending sentencing.

(Text of Excerpts page 1300 omitted)

Kline Memo 9/30/82 - Exhibit 36

Subject — Date

Alleged Selective Service Non-Registrants — SEPT 30 1982

To: Files

From: David J. Kline, Senior Legal Advisor, General Litigation and Legal Advice Section, Criminal Division

On September 8, 1982, Ed Frankle delivered 55 files of alleged non-registrants to me. On September 29, 1982, I referred copies of 50 of the files to the appropriate United States Attorneys' offices. Also on September 29, 1982, I carried 50 of the original files

to Special Agent John McNabb of the Federal Bureau of Investigation.

Concerning the remaining 5 files:

(1) One was previously referred by Selective Service,

(2) One concerned a woman,

(3) One was based on a letter in support of non-registrants and the letter appeared to be from a woman,

(4) One concerned a person who had registered prior to referral, and

(5) One concerned a person who had filled in the registration card, except for the signature line, and attached the card to a letter.

The last file I have assigned to Dan Harris. I asked for his recommendation concerning its appropriate handling.

cc: SA John McNabb
JEH 5064
FBI

VI.

GOVERNMENT EXHIBITS - ADDITIONAL

(INDEXED)

ADDITIONAL GOVERNMENT DOCUMENTS

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1. April 19, 1982 report by the U.S. General Accounting Office, "Alternatives to Current Draft Registration Program Needed Unless Level of Compliance Improves."

REPORT BY THE U.S.
GENERAL ACCOUNTING OFFICE

Alternatives To Current Draft
Registration Program Needed Unless
Level Of Compliance Improves

Young men are required to register for the draft within 30 days of their 18th birthday. GAO found the rate of registration compliance has substantially deteriorated from 93 percent in 1980, when there was a 2-week registration period, to 70 percent for the first 9 months of the 1981 continuous draft registration program. The Selective Service System's records, however, were just as accurate.

A surge of late registrations resulted from the President's January 1982 decision to continue draft registration and from the

media campaign that followed concerning possible prosecution of nonregistrants. GAO believes that, unless this higher rate of registration is sustained during 1982, alternatives will have to be developed.

(U.S. General Accounting Office Seal) April 19, 1982

Request for copies of GAO reports should be sent to

U.S. General Accounting Office
Document Handling and Information
Services Facility
P. O. Box 6015
Gaithersburg, Md. 20760
Telephone (202) 275-6241

The first five copies of individual reports are free of charge. Additional copies of bound audit reports are $3.25 each. Additional

copies of unbound report (i.e., letter reports) and most other publications are $1.00 each. There will be a 25% discount on all orders for 100 or more copies mailed to a single address. Sales orders must be prepaid on a cash, check, or money order basis. Check should be made out to the "Superintendent of Documents".

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

B-201499

The Honorable Jake Garn
Chairman, Subcommittee on HUD
and Independent Agencies
Committee on Appropriations
United States Senate

The Honorable Roger W. Jepsen
Chairman, Subcommittee on
Manpower and Personnel
Committee on Armed Services
United States Senate

The Honorable Edward P. Boland
Chairman, Subcommittee on HUD
and Independent Agencies
Committee on Appropriations
House of Representatives

The Honorable William Nichols
Chairman, Subcommittee on Military
Personnel and Compensation
Committee on Armed Services
House of Representatives

Now that the President has decided to continue draft registration, the completeness and accuracy of the Selective Service System draft registration will be a subject of increased public debate and challenge. Therefore, we have evaluated the 1981 continuous registration program in contrast to the time-limited period of registration, as conducted during 1980. Because of the responsibilities of your Subcommittees concerning the Selective Service System, we believe our findings will be of interest to you.

Registration of young men with the Selective Service System was resumed in 1980 after

a 5-year suspension. Peacetime drafted registration of young men born in 1960 and 1961 was conducted in a 2-week period in July 1980, and a subsequent registration of those born in 1962 was carried in a 1-week period in January 1981. Since then, the Selective Service has conducted continuous registration whereby young men are required to register at the post office within 30 days of the date they reached 18 years of age. Nonregistration is a felony punishable by up to 5 years' imprisonment, a $10,000 fine, or both.

OBJECTIVE, SCOPE, AND METHODOLOGY

Our objective was to determine if the 1981 continuous registration of young men born in 1963 is as accurate and complete as the 1980 registration. We have previously reported that the July 1980 regis-

tration was complete and accurate ("Evaluation of the Recent Draft Registration," FPCD-81-30, Dec. 19, 1980). A copy of that report is included as appendix III.

For 1981 results, we worked at the Selective Service System headquarters in Washington, D.C. We made our review in accordance with our "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions." We reviewed the system designed to conduct the registration and tested its procedures through statistical sampling of 503 completed registration cards and data on them. We obtained computer printouts of the data on these cards from Selective Service computer tapes. We then contacted, by telephone, 347 of the sampled registrants and compared our results with data on

System files.

To determine the completeness of the registration, we reviewed the Service's reports of registration and tested their accuracy by randomly selecting blocks of registration cards, counting them, and comparing our count against their records. We also assessed the accuracy of the Service's estimate of the registrant population size. The statisical testing and methodology we used is described in appendix II.

DRAFTED REGISTRATION CONTINUES TO BE ACCURATE BUT COMPLETENESS HAS DETERIORATED

Although over 6.6 million young men have registered for the draft since its resumption, increasing numbers are failing to register. About 450,000 young men born between January 1 and October 1,

1963, or 30 percent, have failed to register. Only about 1.06 million, or 70 percent, of the 1.51 million young men who should have registered (those turning 18 during the first 9 months of 1981) had done so and were recorded on the Selective Service's master computer files as of December 20, 1981. 1/ (The Selective Service was publicly announced a registration compliance rate of 77 percent. For an explanation of the difference between Selective Service's estimate and our estimate, see app. I, p. 2 of this report.)

In contrast, the compliance rate, as of December 20, 1981 (including late

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1/Young men are required to register within 30 days of their 18th birthday. The cited totals allowed for this period.

registration), for young men born in 1960 was 91.4 percent; for young men born in 1961, 94.2 percent; and for young men born in 1962, 87.4 percent.

Initially, 87 percent of the young men born in 1960 and 1961 registered during the 2-week registration period in July 1980, and 77 percent of the young men born in 1962 registered during the 1-week registration period in January 1981.

Selective Service reports, as of December 20, 1981, show that, despite higher compliance rates than the rates for young men born in 1963, about 545,000 of the 6 million population base for the young men born during 1960 through 1962 still have not registered. In total, then, of the 7.5 million youths required to register in 1980 and through October of

1981, about 1 million have failed to do so. This number will be reduced somewhat, however, due to late registrations among the young men born in 1963.

We analyzed registration compliance by birth month of the registrants and found that young men born in January and February 1963 had the highest rate of registration and that the rate was progressively lower for each succeeding birth month. The registration rates ranged from 76 percent of January and February births to 57 percent of September births. The highest registration rate (76 percent) is still well below the rates achieved in previous years.

The number of available months to register late has a direct impact on the computed compliance rates. For example,

about 59,000 young men born in January 1963 registered 30 or more days after their birthday, whereas only 18,600 young men born in September 1963 registered 30 or more days after their birthday. However, this analysis was based on Selective Service's registration reports as of December 20, 1981, and therefore contained information that was generally only complete for persons registering during the first 10 months of the year. Thus, when complete information on 1981 registration is totaled by the Service, compliance rates for the later birth months may increase significantly.

Many late registrations resulted from the President's January 7, 1982, announcement that draft registration will be continued indefinitely and that nonregis-

trants would be given a 2-month grace period to the end of February 1982 before actions to prosecute begin. The Selective Service has announced that more than 4000,000 late registrations occured during the grace period; however, the individual year group compliance rages have not been determined because the registration forms had not been completely processed as of mid-March 1982.

Other than the issue of registration completeness, we did not find any major problems with the manner in which the 1981 continuous registration was organized and conducted. Concerning accuracy, the Selective Service's estimate of 2.02 million as the universe of 18-year-old males that should have registered in 1981 was reasonable, and the inventory of 1.2

million registration cards recorded on computer files, as of December 20, 1981, was correct.

In reviewing the sample data, however, we noted some deficiencies in (1) key-punching (transposed numbers, misspelled names, etc.) and (2) Postal Service operations. The total errors we found, projected to the entire inventory, represent about 6 percent of the registrants whose cards were on computer files as of August 30, 1981. We believe the number of errors could be reduced further if local postal employees exercised more scrutiny in reviewing registration cards with the registration cards with the registrants, in clarifying illegible data, and also in comparing card data with that shown on the registrants' identification. These find-

ings closely parallel those contained in our December 19, 1980, report.

We found that most of the data regarding names, addresses, dates of birth, and social security numbers on the registration cards and in the data processing system was correct. Of the inventory of registration cards on computer files as of August 30, 1981, we estimate that:

--No cards had obviously fictitious registrant names (Mickey Mouse, Donald Duck, etc.), and 1.7 percent had misspelled names.

--No cards had obviously fictitious registrant addresses (Earth, White House, etc.), and 0.9 percent of the cards had inaccurate addresses (of those

which were inaccurate, one-third involved the street and two-thirds the zip code).

--1.7 percent of the cards had date-of-birth errors.

--2 percent of the cards had errors in social security numbers.

In almost all cases, the individual (1) registered personally at a local post office, (2) was an 18-year-old male who was required to register, and (3) was not in the Armed forces at the time of registration.

Overall, the Postal Service performed tasks in accordance with prescribed procedures. In most cases, registrants obtained blank registration cards at the post office from a self-service counter or

from an employee and returned the completed registration card to a postal employee directly. About 25 percent of the registrants, however, told us that postal employees did not ask them for identification, which would verify information on the registration card.

The Selective Service followup procedures to verify data accuracy were generally effective. In most cases, registrants received a registration acknowledgement letter from the Selective Service, and the information in the letter was correct. Details of our findings are presented in appendix I.

CONCLUSIONS

Compared to the time-limited registrations conducted in 1980 and early 1981 continuous registration program is just as

accurate but much less complete. Unless the higher rate of registration resulting from the surge of late registrations during January and February is sustained during 1982, alternatives for achieving improved compliance will have to be developed.

One alternative is a return to the time-limited registration program which has had proven success. The results of the two time-limited programs indicate that the Selective Service can, perhaps, more effectively apprise youths of the registration requirement through a more intensive advertising campaign than is possible with current funding for advertising throughout the year.

We recognize, however, that lack of knowledge about the registration require-

ment is only one of several possible causes of the substantial deterioration in registration compliance. Other possible reasons are that the nonregistrants: (1) believed the President would abolish draft registration, (2) thought they would not get caught, (3) saw older peers who were not required to register and were resentful, (4) knew others who had not registered and were not penalized, and (5) planned to register only if the country were threatened. Selective Service officials suggested the following alternatives that could also be considered for raising compliance: (1) improving Selective Service's public affairs program by adding paid advertising to existing free public service advertising and performing targeted marketing, (2) increasing the number of registration locations by adding high schools, Federal employment offices, and private sector personnel offices, (3) registering people through the use of existing Government computer files, (4) registering only those in the prime age zone (i.e., 19 and 20) either with continuous or one-time registration, and (5) increasing the enforcement effort using names and addresses in Social Security Administration and Internal Revenue Service computer files.

AGENCY COMMENTS

The Selective Service agreed with our findings and was pleased that the Service's registration process continued to achieve a high degree of accuracy. However, the Selective Service shared our concerns

about the deterioration of registration compliance.

The Selective Service agreed that, if compliance does not improve significantly in 1982, alternatives for raising compliance will have to be developed. The Selective Service pointed to several specific alternatives that could be considered besides the return to the time-limited registration proposed in our draft report. We generally agree with the alternatives suggested and have included them in this report.

Concerning the compliance rate for the 1981 registration, the Selective Service said that final figures are not yet available because of a large backlog of late registrations that have not been processed. As suggested by the Selective

Service, we added a section to the report explaining that the 70-percent registration compliance rate we computed covered a different time frame and was based on a different technique than the 77-percent compliance rate publicly announced by Selective Service in November 1981.

- - - -

We are sending copies of this report to the Secretary of Defense; the Director, Selective Service System; the Director, Office of Management and Budget; and other interested persons.

/s/
Clifford I. Gould
Director

EVALUATION OF THE SELECTIVE SERVICE SYSTEM'S 1981 CONTINUOUS REGISTRATION

REGISTRATION RESULTS

The Selective Service reports accurately state the extent of registration by young men born in 1963. However, over 450,000 young men have failed to register. Only about 1.06 million, or 70 percent, of the 1.51 million young men who should have registered during the first 9 months of 1981 had registered and were recorded on the Selective Service's master computer files as of December 20, 1981. Complete results of the 1981 continuous registration were not known as of mid-March 1982. This lag is caused by men registering an average of 22 days after their 18th birth-

day, most post offices forwarding completed forms only once every 4 weeks, and Selective Service data entry and tabulation taking some additional weeks.

Monthly registrations

The continuous registration of men born in 1963 began in January 1981. Young men are now required to register with the Selective Service at their local post office within 30 days of their 18th birthday. To determine the completeness of the registration program, we analyzed registration compliance by birth month of the registrants.

Young men born in January and February 1963 had the highest rate of registration, and the rate was progressively lower for each succeeding birth month. The registration rates ranged from 76 percent of

January and February births to 57 percent of September births. We believe that the number of available months to register late has a direct impact on the computed compliance rates. For example, about 59,000 young men born in January 1963 registered 30 or more days after their birthday, whereas only 18,600 young men born in September 1963 registered 30 or more days after their birthday.

However, this analysis was based on the Selective Service's registration reports as of December 20, 1981. and therefore contained information that was generally only complete through October 1981. Thus, when complete information on 1981 registrations is recorded by the Selective Service, compliance rates for the later birth months may increase

significantly.

The results of our analysis of registrants' compliance by birth month follows.

Month	1963 births	1981 registrations	Percent of births registered
	- - - - - (000 omitted) - - - -		
Jan.	167	127	76
Feb.	153	116	76
Mar.	168	126	75
Apr.	159	117	74
May	165	119	72
June	164	116	71
July	177	120	68
Aug.	181	116	64
Sept.	180	102	57
Total	1,514	1,059	70

The Selective Service announced a 77-percent compliance rate in early November 1981 covering a different time frame and based on a different technique. Its estimate was based on raw data not broken out by birth month and included a backlog of 245,000 registrations being processed but

not yet posted to the master file. In calculating the compliance rate, the Selective Service assumed that the entire backlog was associated with men born during the first 8 months of 1963. Accordingly, the compliance rate would be over-stated to the extent that the backlog consisted of registrants born after August 31, 1963. (Subsequent reports show that about 72,000 of the backlogged registrants were born after August 31, 1963.) Our compliance rate estimates excluded a backlog of about 102,000 registrations awaiting processing as of December 20, 1981. We excluded the backlog because no effective means was available at that time to estimate that portion of the backlog represented persons born during the first 9 months of 1963.

Calculation of registrant universe

The Selective Service estimate of the registrant population size of 2.02 million is reasonable although there were some deficiencies in the data used. The Service's estimate of the population size was based on 1980 population statistics published by the bureau of Census, Department of Commerce, and reduced by 25,000 institutionalized males and 84,000 males in the Armed Forces. Census information the Service used did not account for the population of the U.S. territories and possessions. We estimated the population of registration-age males in Puerto Rico, the Virgin Islands, and Guam at about 30,000 which, when added to the Service's estimate, would increase the total universe to about 2.05 million.

Our estimate, as with any estimate, involves some assumptions because of data limitations and/or nonavailability. The additional increase of registrants from our estimate is not particularly significant in that it would slightly decrease any reported registration compliance rate by about 1.5 percentage points. Including young men from all affected areas will, we believe, produce a more accurate estimate of registrant population size.

Number of registration cards in inventory

To test the accuracy of the 1981 continuous registration, we sampled registration cards on file with the Selective Service. We counted cards and verified numbers of registrants contained in the Service's reports with numbers contained in control documents and reviewed the

cards for obvious fictitious names and/or erroneous addresses (such as Mickey Mouse, Donald Duck, Earth, White House, etc.). Our count agreed in all instances with that shown on the control documents. Also, no cards had obviously fictitious names or erroneous addresses. The number of cards on file with the Service as of August 30, 1981 (we made our tests in early Sept.) was about 453,000. This agreed with the numbers reported by the Service. See appendix II for a further discussion of our methodology.

Although we sampled all cards on file as of August 30, 1981, the inventory of young men born in 1963 and of those registered at that time generally represented only those young men born during January through May. This is partially due to the

lag which occurs between the date a young man turns 18 and the date his registration information is recorded in the Service's computer files.

As of December 26, 1981, the Service had about 1.2 million cards recorded on its computer files. This generally represents those young men during January through September of 1963.

ACCURACY OF THE REGISTRATION DATA

To test the accuracy of the registration data, we sampled 363 registration cards on computer files with the Selective Service. We talked, by telephone, with 347 of the sampled registrants and found that most of the data regarding names, addresses, dates of birth, and social security numbers on the registration cards and in the Service's data processing system was

accurate. The total errors, projected to the entire inventory, represent about 6 percent of the registrants whose cards were on file as of August 30, 1981.

The name errors were all the result of misspelling (by one letter) the last name of the registrant because of illegible writing on the registration card. Had local postal employees carefully reviewed the cards with the registrant and clarified the illegible data, fewer errors would have been made.

The address errors consisted of one missing number of a street, one omitted zip code, and one illegible zip code erroneously keypunched. However, 14 registrants provided us with different street addresses than those recorded on their registration cards and Selective

Service records. These registration cards and Selective Service records. These registrants said they had not moved but, rather, the information provided to us was a different way of reporting the same street address, for example, box number versus rural route number. Eight additional registrants provided us with completely different address (street, city, and zip code) information. We believe these differences are due to subsequent changes of address rather than to deficiencies in initially recording registration information. We now have another review underway to determine the degree to which address changes are reported by registrants to the Selective Service.

Date-of-birth errors consisted of one clearly printed record in which the day

was keypunched incorrectly, three clearly printed records in which the registrant apparently provided an erroneous day of birth, and two illegible records in which the registrant used a number rather than the required three-letter appreviation for the birth month. Some of these type errors could have been avoided had local postal employees carefully compared the information written on the registration card with identification supplied by the registrant.

Social security number errors consisted of seven registration records generally containing one or two digits incorrectly recorded on the Selective Service's computer files. The space containing the social security numbers on the completed cards had been blacked out to protect the privacy of the registrants. Thus, we

could not determine if illegible numbers were the reason for the errors. Also, 15 of our sampled registrants did not report a number to the Selective Service.

It should be noted that a U.S. district court ruled in 1980 that using social security numbers violated the Privacy Act and prohibited the Selective Service from requiring registrants to report social security numbers. However, a stay of the district court's order was granted by a circuit court of appeals. Amendments in 1981 to the Military Selective Service Act now permit the Service to require registrants to report social security numbers.

The results of our inquiry into the accuracy of the registration data follow. Our projections are subject to a maximum sampling error of about plus or minus 2

percent within a 95-percent confidence level. To the extent that there are large error rates in the portion of the sample we were unable to contact, the conclusions we reach, of course, would be different.

Issue	No. in sample	Percent of those responding	Projected no. in universe (note a)
Name:			
Correct name	340	98.3	306,200
Misspelled name	6	1.7	5,400
	346	100.00	311,600
Did not answer	1		900
	347		312,500
Address:			
Correct address	342	99.1	308,000
Inaccurate street	1	0.3	900
Inaccurate zip code	2	0.6	1,800
	345	100.0	310,700
Did not answer	2		1,800
	347		312,500

Issue	No. in sample	Percent of those responding	Projected no. in universe (note a)
Date of birth:			
Correct birth date	340	98.3	306,200
Incorrect birth date	6	1.7	5,400
	346	100.0	311,600
Did not answer	1		900
	347		312,500
Social security number:			
Correct number	325	93.7	292,700
Incorrect number	7	2.0	6,300
Not recorded	15	4.3	13,500
	347	100.0	312,500

a/See app. II for a discussion on our methodology used to project numbers in this table as well as those in the tables follow.

WHO REGISTERED AND HOW

We found, in almost all cases, that (1) the individual did register personally at a local post office with the Selective Service, (2) the person was an 18-year-old male who was required to register, and (3) the individual was not in the Armed Forces at the time of registration. In the excepted cases, three registration cards were filled out by a relative, one registration card was filled out by a friend, and two young men were in the Armed Forces at the time of registration.

The results of our inquiry into who registered and how follow.

Issue	No. in sample	Percent of those responding	Projected no. in universe
How registered:			
Registered self	338	98.8	304,400
Registered by someone else	4	1.2	3,600
	342	100.0	308,000
Did not answer	5		4,500
	347		312,500
Sex:			
Males	347	100.0	312,500
Females	0	0.0	0
	347	100.0	312,500
Age:			
18 years	346	100.0	311,600
Did not answer	1		900
	347		312,500
In Armed Forces at time of registration:			
No	345	99.4	310,700
Yes	2	0.6	1,800
	347	100.0	312,500

REGISTRATION SYSTEM AND OPERATIONS

Overall, the Postal Service and the Selective Service performed tasks in accordance with prescribed procedures. The system developed and used to conduct registration generally consisted of the following:

--The U.S. Postal Service provides the personnel and locations for the registration. Postal clerks at about 34,000 post offices are involved in the registration process.

--The Selective Service trained post office headquarters officials who, in turn, were responsible for the training of local post office employees.

--Persons having to register report to the post office, pick up the registration card, complete it, and return it to the postal employees.

--The postal employee attempts to verify the information written on the registration card with registrants' identification information. If an identification is not available, the card is noted as such and accepted because of the need to register all young males within 30 days of their 18th birthday.

--Postal employees stamp, initial, and mail the completed cards to the Selective Service computer center.

--The Selective Service computer center receives, sorts, numbers, and edits the registration cards and keypunches the information on computer tape.

--The Selective Service maintains control over the registration cards and makes internal checks as to the authenticity of the registration and accuracy of key registration information. It also provides each registrant with a letter acknowledging his registration and request information concerning changes in the orginally provided data.

Postal Service operations

The Postal Service performed several tasks during the registration process, including maintaining, controlling, and providing cards to registrants; reviewing the cards for completeness; and verifying certain data against a presented form of identification. We asked registrants to

recall what procedures they followed at the post offices and to verify their place of registration. These questions were asked to evaluate the manner in which the procedures were followed.

Overall, the Postal Service performed tasks in accordance with prescribed procedures. In most cases, registrants obtained blank registration cards at the post office from a self-service counter or from an employee and returned the completed registration card to a postal employee directly. About 7 percent of the registrants, however, left the completed card on the counter, mailed it in, or returned the card to someone other than directly to a postal employee. Thus, postal employees were unable to request identification to verify the data regis-

trants provided. In addition, about 25 percent of the registrants who did return completed registration cards directly to a postal employee told us that postal employees did not ask them for identification which could be checked. The results of our questions follow.

Issue	No. in sample	Percent of those responding	Projected no. in universe
Blank registration card was obtained from:			
Post office	328	97.0	295,400
Someone else other than the registrant	6	1.8	5,400
Mail delivery	3	0.9	2,700
Courthouse	1	0.3	900
	338	100.0	304,400
Not applicable	9		8,100
	347		312,500

Issue	No. in sample	Percent of those responding	Projected no. in universe
Completed registration card was:			
Returned to postal employee directly	313	92.6	281,900
Left on counter	13	3.8	11,700
Mailed in	9	2.7	8,100
Don't remember	3	0.9	2,700
	338	100.0	304,400
Not applicable	9		8,100
	347		312,500
Postal employee asked registrants for identification:			
Yes	211	67.4	190,000
No	80	25.6	72,100
Don't remember	22	7.0	19,800
	313	100.0	281,900
Not applicable	34		30,600
	347		312,500

Issue	No. in sample	Percent of those responding	Projected no. in universe
Registrant showed an identification:			
Yes	212	67.7	190,900
No	76	24.3	68.500
Don't remember	25	8.0	22,500
	313	100.0	281,900
Not applicable	34		30,600
	347		312,500
Post office employee checked registrants' identification:			
Yes	210	88.6	189,100
No	5	2.1	4,500
Don't remember	22	9.3	19,800
	237	100.0	213,400
Not applicable	110		99,100
	347		312,500

Selective Service followup procedures

The Selective Service followup procedures for verifying data accuracy were generally effective. In most cases, registrants received a registration acknowledgement letter from the Selective Service, and the information in the letter was correct. Although one-fifth of the randomly selected registrants told us that they had not received an acknowledgement letter, Selective Service records show that, at the time those interviews were conducted, each respondent had been mailed an acknowledgement letter and that only 1.5 percent were undeliverable. The results of our inquiry follow.

Issue	No. in sample	Percent of those responding	Projected no. in universe
Registrant received an acknowledgement letter from the Selective Service:			
Yes	258	74.3	232,300
No	70	20.2	63,100
Don't remember	19	5.5	17,100
	347	100.0	312,500
Registration information in the letter was correct:			
Yes	236	91.5	212,500
No	13	5.0	11,700
Don't remember	9	3.5	8,100
	258	100.0	232,300
Not applicable	89		80,200
	347		312,500

APPENDIX II

METHODOLOGY USED IN EVALUATING SELECTIVE SERVICE'S 1981 CONTINUOUS REGISTRATION PROGRAM

We reviewed the system designed to conduct the registration and tested its procedures through statistical sampling of completed registration cards and data on them. Specifically, we sampled 503 registration cards from the 452,942 inventory of registration cards of males born in 1963 as of August 30, 1981, using statistical sampling techniques. We obtained computer printouts of the data on these cards from the Selective Service computer tapes. We then interviewed the registrants, by telephone, through the use of a standard questionnaire, and compared the question-

naire results with data on system files.

We were able to directly contact 347, or 69.0 percent, of the 503 sampled registrants. These registrants provided information pertaining to their identity and their registration with the Selective Service. To test the accuracy of the registration data, we compared information provided to us by registrants regarding sex, names addresses, dates of birth, and social security numbers with information on registration cards and in computer files of the Security Service. We asked registrants to recall what procedures they followed at the post offices and to verify their place of registration. These questions were asked to evaluate the manner in which post office and Selective Service procedures were followed.

We were unable to contact 26 registrants because they had no telephone and 130 registrants who were not available when we called. However, we did speak with either a relative, a friend, or a roommate of 31 of these registrants who acknowledged knowing the individual we were attempting to call. We made at least 5 attempts to get in touch with the remaining 99 registrants. Thus, we could identify, with a degree of certainty, 378 registrants. We did not attempt to verify information about the registrant with the relative, friend, or roommate because of unknowns and uncertainties associated with secondhand information. Our data results pertain to the information concerning 347 registrants that we could contact.

Using a 95-percent confidence level, we projected our telephone interview results to a universe of 312,500. Projections regarding the accuracy of the registration data and who registered and how are subject to a maximum sampling error of about plus or minus 2 percent. Projections regarding the registration system and operations are subject to a maximum sampling error of plus or minus 5 percent. The universe of 312,500 was determined by applying the same ratio, 69 percent, that our telephone response (347 of 503) represented to the total 452,942 universe, as of August 30, 1981. To the extent that there are large error rates in the portion of the sample we were unable to contact, the conclusions we reach, of course, would be different. The results

of our telephone calls are discussed in appendix I.

To determine the completeness of the registration, we reviewed the Service's reports of registration and tested their accuracy by randomly sampling the 452,942 registration cards of young men born in 1963 on file with the Selective Service as of August 30, 1981. We counted cards and verified numbers contained in the Service's reports with those in control documents and reviewed cards for obvious fictitious names and/or erroneous addresses.

Selective Service procedures call for completed registration cards to be sequentially numbered and grouped into blocks of 100. The Selective Service maintained control documents which showed the total cards in each block and the cumula-

tive number of cards. To verify the block count, we counted cards in randomly selected blocks and matched our count against the System's control documents.

We also assessed the accuracy of the Service's estimate of the registrant population size. We compared 1980 population statistics published by the Bureau of Census with the Selective Service estimates.

APPENDIX III

UNITED STATES GENERAL ACCOUNTING OFFICE

Washington, D.C. 20548

B-201499 December 19, 1980

The Honorable William Proxmire
Chairman, Subcommittee on HUD
and Independent Agencies
Committee on Appropriations
United States Senate

The Honorable Sam Nunn
Chairman, Subcommittee on
Manpower and Personnel
Committee on Armed Services
United States Senate

The Honorable Edward P. Boland
Chairman, Subcommittee on HUD
and Independent Agencies
Committee on Appropriations
House of Representatives

The Honorable Richard C. White
Chairman, Subcommittee on Military
Personnel
Committee on Armed Services
House of Representatives

Subject: Evaluation of the Recent Draft Registration (FPCD-81-30)

The completeness and accuracy of the recent draft registration conducted by the Selective System has been subject to challenge by a variety of critics and organizations. This issue has been compounded by court actions on the registration of women and the questioned use of social security numbers in the registration process. Collectively, these developments have raised a serious question concerning the use of the registration program in a national emergency. This question is made even more critical because of the commitment to register yet additional youths beginning in January.

For these reasons, we evaluated the registration program and related issues, and because of the responsibilities of your Committee with respect to the Selective

Service System, we believe that our findings will be of interest to you.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this review was to test the accuracy and completeness of the registration program. We worked at the Selective Service System headquarters in Washington, D.C. We reviewed the system designed to conduct the registration and tested its procedures through statistical sampling of completed registration cards and data on them. Specifically, we sampled about 400 registration cards, using valid statistical sampling techniques. We reviewed data on these cards and compared them against Selective Service System computer tapes. In addition, we interviewed, by phone, 309 of our sampled registrants and compared our results with data

on System files. We also assessed the accuracy of the System's registration card count by randomly selecting blocks of cards, counting them, and comparing our count against their records. (Details of our findings and a description of our statistical testing and methodology are explained in enclosure II.)

DRAFT REGISTRATION IS COMPLETE AND ACCURATE

Overall, we did not find any major problems with the manner in which registration was organized or conducted. In reviewing the sample data, however, we noted some errors, as well as some discrepancies, in keypunching (transposed address numbers, misspelled names, etc.), postal service operations, and followup procedures to verify data accuracy. In total, however, these errors did not significantly affect

the registration program.

Concerning the accuracy and completeness of the registration program, we found that:

--The Selective Service System's estimate of 3.8 million as the universe of 18- and 19-year-old males that should have registered was reasonable.

--The inventory of registration cards closely approximated the 3.6 million the Selective Service System had publicly announced.

--Most of the data regarding names, addresses, dates of birth, and social security numbers on the registration cards and in the data processing system was accurate. The total errors were found, projected to the entire inventory, represent about 5

percent of the registrants, and they were predominatly caused by illegible registration data on the cards. Within the more than 3 million registration inventory, we estimated that only

--459 cards had obviously fictitious registrant names (Ronald Reagan, Jimmy Carter, etc.), another 9,000 had non-verifiable names, and another 36,000 had misspelled names;

--459 cards had obviously fictitious registrant addresses (Earth, White House, etc.), and another 81,000 had inaccurate addresses (33 percent zip code and 67 percent city/street);

--27,000 cards had date-of-birth errors which were due to inaccurate coding; and

--18,000 cards had errors in social security numbers.

Further, while these errors represent a significant number of registrants, the System corrected or was in the process of correcting most of them. Eliminating all the errors, however, is unrealistic although final accuracy levels of 98 percent do not appear to be unreasonable expectations.

Recent actions by the U.S. Supreme Court and a U.S. District Court on the questions of the constitutionality of limiting the registration process to men and the use of social security numbers in the registration process also merited our

evaluation.

If the Supreme Court decides that women also must be registered, the System would have no problem in doing so. Current forms provide for identification of sex, and this data could be readily processed by the System's computers. If additional youths were registered, however, there would be added costs, estimated by the System to be about $2 a person. Thus if the System registered about 3.6 million women, costs would exceed $7 million.

The U.S. District Court's November 14, 1980, decision that the System's use of Social Security numbers violates the Privacy Act portends greater problems for the System. If finally sustained through all legal reviews, the prohibition against requiring social security numbers would

remove one of the system's internal data verification controls. Unless a final court decision is made quickly, it appears that the System will have the time to develop adequate alternative controls or to obtain legislative approval to use social security numbers in its registration efforts.

CONCLUSIONS

We believe the Selective Service System has made significant progress in designing an effective registration program and correcting the numerous shortcomings we have disclosed in our prior reports. (See enc. I.) We were particularly pleased to note the coordination achieved by an integrated labor force (other Government agencies, contractors, and Selective Service employees) and sophisticated planning

methods to accomplish the registration program. We were also pleased to observe the commitment of the System's personnel to the achievement of its goals.

- - - - -

We discussed our findings with the Director of the Selective Service System. He was pleased with the advancements the System has made since registration and agreed that our prior reports were accurate in pointing out that the previous postmobilization registration plans would not have met the Department of Defense's manpower needs.

We are sending copies of this report to the Secretary of Defense; the Director, Selective Service System; Director, Office

of Management and Budget, and other interested parties.

Sincerely yours,

/s/
M. L. Krieger
Director

Enclosures

List of Prior Reports on
the Selective Service System

1. "What Are the Capabilities of the Selective Service System?" FPCD-79-4, December 14, 1978.
2. "Weaknesses In the Selective Service System's Emergency Registration Plan" FPCD-79-89, August 29, 1979.
3. "Actions To Improve Parts of the Military Manpower Mobilization System Are Underway" FPCD-80-58, July 22, 1980.

EVALUATION OF SELECTIVE SERVICE
SYSTEM'S REGISTRATION PROGRAM

REGISTRATION SYSTEM, SCOPE,
AND METHODOLOGY

The system developed and used to conduct registration generally consisted of the following:

--The U.S. Postal Service provided the personnel and locations for the registration. Postal clerks at about 14,000 post offices were involved in the registration process.

--The Selective Service System trained post office headquarters officials who in turn were responsible for the training of local post office employees.

--Persons having to register were to report to the post office, pick up the registration card, complete it,

and return it to the postal official.

--The Postal official was to seek an identification to verify the data written on the registration card. If an identification was not available, the card was to be noted as such and accepted because of the need to register all individuals in the required age groups.

--Postal officials were to stamp, initial, and mail the completed cards to one of 6 predetermined Internal Revenue Service processing centers.

--Internal Revenue Service processing centers were to receive, sort, number and edit the registration cards and keypunch the information on computer tape. The cards and tapes were to be forwarded to the Selective Service

System.

--The Selective Service System was to maintain control over the registration cards and make internal checks as to the authenticity of the registrant and accuracy of key registration data. They also were to provide each registrant a letter acknowledging his registration and request information with regard to changes in the originally provided data.

CALCULATIONS OF REGISTRANT UNIVERSE

The Selective Service System estimate of the registrant population size is reasonable although there were some deficiencies in the data used. The Selective Service System's estimate of the registrant population size was about 3.88 million 18- and 19-year old males. This estimate was

based upon 1979 population statistics published by the Bureau of Census and reduced by a calculated number of institutionalized males and those in the Armed Forces. The following table indicates the numbers derived by the Selective Service System.

	Year of birth		
	1960	1961	Total
Estimated male population	2,160,000	2,150,000	4,310,000
Less:			
Institutionalized	30,000	30,000	60,000
Service members	201,000	169,000	370,000
Total	1,929,000	1,951,000	3,880,000

In evaluating the above calculations we found that the Bureau of Census population data used by the Selective Service System did not account for U.S. civilian

citizens living abroad or the population of the U.S. territories and possessions. We estimated the population of these areas and determined the total universe to be about 3.98 million.

The difference between the Selective Service System's estimate and ours is about 96,000 registrants maximum but the difference should be less because of the population decline between 1979 and 1980 which we did not take into account.

As with our estimate, any estimate involves some assumption because of data limitations and/or nonavailability. Results obtained would vary depending on the assumptions made. The additional increase of 96,000 registrants from our estimate is not that significant in that it would slightly decrease the registrant

compliance rate from 93 percent to 91 percent. We believe the system estimate was reasonable considering there was only a slight difference in our estimate and that of the Selective Service System's. We believe, however, that when the 1980 census data is available, the System should update its calculation and include the population from all affected areas.

NUMBER OF REGISTRATION CARDS IN INVENTORY

We sampled the registration cards on file with the Selective Service System to (1) count and verify numbers contained in Selective Service System's public statements against control documents and (2) review them for obvious fictitious names and/or erroneous addresses. We found our count agreed in all instances with that shown on the Selective Service Systems'

control documents, except for one card with an obviously fictitious name and one card with an erroneous address.

Selective Service System procedures call for completed registration cards to be sequentially numbered and grouped into blocks of 100. The blocks were further grouped into batches of about 1,350 cards and boxed accordingly. There were about 2,700 boxes (37,715 blocks) on file with the Selective Service System in late September--the time we made our tests. The Selective Service System maintained control documents which showed the total cards in each block and the cumulative in each box. To verify the block count we counted cards in 82 blocks (7,846 cards) and matched our count against the System control documents. In all instances the System's count and our

count agreed. Statistically our tests indicated that with a 95-percent confidence level, the number of cards on file with the Selective Service System is about 3.6 million and this agrees with the numbers published by the Selective Service System.

While counting the records, we also reviewed them for obviously fictitious names and erroneous addresses. We found one card in each category. One card had the name Reagan, born 1907, and Republican Party as the address. The other card had Earth as the address. The cards were not found in the same block of 100 cards. Statistically this would indicate that there would be between 1 and 1,383 registration cards with obviously fictitious names and between 1 and 1,383 with obviously erroneous addresses among the 3.6

million cards. Considering that these errors were not on the same card there would be a maximum of about 2,766 cards (or .08%) with these kind of errors in the inventory.

SAMPLED REGISTRATIONS

We randomly sampled 406 registration cards to verify the information on them against the data transferred to Selective Service System computer tapes. We also interviewed registrants by phone. Our tests were to assess keypunching accuracy, identify procedural weaknesses, and verify the data with the actual registrant. For the most part we found the data on Selective Service System records was accurate. Most of the problems we found were caused by illegible data on the registration card and inaccurately recorded on the

System's computer tapes. Most of these errors can be minimized by having local postal officials go over the cards with the registrant and reprint illegible data.

Generally, the Selective Service System designed an effective data processing system to control and maintain registration data. The methodology we employed to test data accuracy and internal procedures is described in the following sections.

METHODOLOGY

We determined that 369 of the 406 sampled registration cards had contained a complete telephone number. We were able to obtain telephone numbers for an additional 9 registratns through directory assistance, therefore, we could attempt to contact 378, or 93 percent, of the sampled registrants. Because of this high percentage we chose to

interview registrants by phone to verify the the information on the registration card, rather than use other data verification techniques. Also, we could test the internal control procedures to prevent erroneous data from entering the system after the actual date of registration. Also, telephoning the registrant provided a means for obtaining information quickly and consistently through the use of a standard questionnaire. Also, the 93 percent would represent about 3.4 of the 3.6 million registration cards in the inventory.

TELEPHONE INTERVIEW RESULTS

We were able to directly contact 309 of the 378 registrants. Each of these registrants provided information pertaining to their identity and their registration with the Selective Service System. We also

spoke with either a relative, friend, or roommate of an additional 37 registrants who acknowledged knowing the individual we were attempting to call. Thus, we could identify, with a degree of certainty, 347 registrants. We did not attempt to verify information about the registrant with relative, friend, or roommate because of unknown and uncertainties associated with second hand information. Our data results pertain to the information concerning the 309 registrants that we could directly contact.

The issues we covered in our interview related to (1) the accuracy of the registration data on Selective Service System files, (2) who actually did the registering, (3) the sex of the registrant, (4) Armed Forces commitments, and (5) procedures

followed by post office officials dealing with the registrant. The first issue results were shown on page 2. We used a 95 percent confidence level with a + or - 5 percent error factor. The following discusses the results of the remaining issues.

Who Registered, Sex of Registrant, and Armed Forces Commitment

We found that in the majority of cases that (1) the individual did register personally with the Selective Service System, (2) the person indicated being of the male sex which was required to register, and (3) the individual was not in the Armed Forces at the time of registration. Five people indicated they were in the Armed Forces, but it should be noted that 18- and 19-year old individuals serving in the National Guard or Reserves were required to register. We did not determine whether

these five were in this category. The following table indicates the results of our inquiries into these issues:

Issue	No. in sample	Percent of those contacted	Projected no. in universe (000 omitted)
(1) How registered			
Registered self	305	98.7	2,740
Registered by someone else	1	.3	8
Don't know how registered	3	1.0	28
(2) Sex			
Males	309	100	2,776
Females	0	0	
(3) In Armed Forces at time of registration			
Yes	5	1.6	44
No	304	98.4	2,731

The above statistics are projected against about 2.8 million of the 3.4 million registrants. The 3.4 million represents the universe of those on which we had telephone numbers and could attempt contacting.

Postal Service Operations

The Post Office performed several tasks during the registration process including maintaining, controlling, and providing cards to registrants; reviewing the cards for completeness; and verifying certain data against a presented form of identification. We asked each registrant to recall what procedures they followed at the post offices and to verify their place of registration. These questions were asked to evaluate the manner in which the procedures were followed. Overall, the post office

officials performed those tasks they were asked to do. The following table shows the results of our questioning and as in the preceding section is projected against the 2.8-million universe.

Issue	No. in sample (note a)	Percent of those contacted	Projected no. in universe (000 omitted)
At post office, the registration card was obtained			
behind counter	165	53.3	1,479
Self service counter	130	42.1	1,169
Other	10	3.2	89

a/ Totals may not add to 309 because the registrant may not have been asked or may not have answered every question.

Issue	No. in sample (note a)	Percent of those contacted	Projected no. in universe (000 omitted)
completed registration card was:			
Returned to postal official directly	294	95.1	2,640
Left on counter	6	1.9	53
Mailed in	3	1.0	28
Other	2	.6	17
Postal official asked registrant to show identification			
Yes	232	75.1	2,085
No	42	13.6	377
Don't remember	20	6.5	180

a/ Totals may not add to 309 because the registrant may not have been asked or may not have answered every question.

Issue	No. in sample (note a)	Percent of those contacted	Projected no. in universe (000 omitted)
Registrant showed ar identification			
Yes	230	74.4	2,065
No	51	16.5	458
Don't remember	13	4.2	117

a/ Totals may not add to 309 because the registrant may not have been asked or may not have answered every question.

(967028)

Report By The U.S.

GENERAL ACCOUNTING OFFICE

ALTERNATIVES TO CURRENT DRAFT REGISTRATION PROGRAM NEEDED UNLES LEVEL OF COMPLIANCE IMPROVES

Young men are required to register for the draft within 30 days of their 18th birthday. GAO found the rate of registration compliance has substantially deteriorated-from 93 percent in 1980, when there was a 2-week registration period, to 70 percent for the first 9 months of the 1981 continuous draft registration program. The Selective Service System's records, however, were just as accurat9.

A surge of late registrations resulted from the President's January 1982 decision to continue draft registration and from the

media campaign that followed concerning possible prosecution of nonregistrants. GAO believes that, unless this higher rate of registration is sustained during 1982, alternatives will have to be developed.

*United States
General Accounting Office Seal

FPCD-82-20
April 19, 1982

STATEMENT OF

THOMAS K. TURNAGE

DIRECTOR OF SELECTIVE SERVICE

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND

THE ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

JULY 28, 1982

NOT FOR PUBLICATION UNTIL RELEASED

BY HOUSE COMMITTEE ON THE JUDICIARY

* * *

We presently have 8,365,000 registrants on hand from a potential registrant population of 9,309,000. Thus, there are approximately 674,000 non-registrants.

* * *

June 30, 1982 memorandum from Jensen to F. Henry Habight, II, Special Assistant to the Attorney General

Subject: Selective Service Non-Registrant Indictment

Date
June 30, 1982

To
F. Henry Habight, II
Special Assistant to the Attorney General

From
D. Lowell Jensen
Assistant Attorney General
Criminal Division

Pursuant to your request, attached please find a background memorandum, which is not for public release, dealing with the Selective Service non-registrant indictment which we anticipate will be returned today.

In addition, we attach a second memorandum containing information which may be released to the public in the event that the indictment is actually returned.

Attachments

BACKGROUND INFORMATION
NOT FOR PUBLIC RELEASE

Before 3:00 PM we anticipate that a grand jury in the Southern District of California (San Diego) will return an indictment against an individual for failing to register with the Selective Service System. The willful failure to register with the Service is a felony punishable by a maximum penalty of five years' imprisonment and a $10,000 fine. This is the first such indictment since registration was resumed in July of 1980.

This matter and the other non-registrant matters currently under investigation by the Department of Justice are the result of either alleged non-registrants reporting themselves or third parties reporting them to Selective Service. Consequently the first prosecutions are liable to consist of a large sample of persons who object on

religious and moral grounds and persons who publicly refuse to register. The individual whom we anticipate will be indicted appears to be both a moral objector and to be publicly vocal about his registration refusal. The Department of Justice has played no role in choosing either the alleged non-registrant or the district in which the first indictment is being sought.

In the event that an indictment is returned, we will supplement this memorandum with information which can be released publicly.

RELEASABLE INFORMATION CONCERNING
FIRST NON-REGISTRANT INDICTMENT

On June 30, 1982, Benjamin H. Sasway was indicted by a grand grand jury in the Southern District of California (San Diego) for refusing to register with the Selective Service System. The willful failure to

register with the Service is a felony punishable by a maximum penalty of five years' imprisonment and a $10,000 fine. This is the first such indictment since registration was resumed in July of 1980.

May 27, 1981 memorandum from Jensen to Associate Attorney General Rudolph Giuliani

D. Lowell Jensen
Assistant, Attorney General
Criminal Division

Typed: 5-27-81

Prosecution of Persons Who Refused to Register with Selective Service

Rudolph Giuliani
Associate Attorney General

Selective Service intends to refer 75 to 100 matters to the Department of Justice in mid-June for investigation and possible prosecution. 1/ These are matters in which

1/ Criminal Division attorneys were informed of the anticipated referrals in a May 26, 1981, meeting with Selective Service Associate Director for Policy, Development and Administrative Legal Systems Edward Frankle and General Counsel Henry Williams. Even the mid-June date is tentative.

young men wrote to the Service and stated that they refused to register. The Service is also creating an enforcement mechanism for instances in which it has received other information that individuals failed to register. Finally, the Service is in the initial state of creating an active enforcement mechanism which is general in nature. 2/

Section 462(a) of title 50, United States Code Appendix, prohibits the evading or refusing to register with the Selective Service System. Persons convicted of violating the section may be fined not more than $10,000 or imprisoned not longer than five years or both.

There are two possible problems with proceeding at this time with prosecution.

2/ The Service would like to obtain access to Social Security Records. Apparently one version of a defense appropriations bill would give it such access.

First, the constitutionality of the Selective Service System is under serious attack in the United States Supreme Court. Second, the President has just reiterated his preference for a volunteer military. Thus, assuming that Selective Service does refer to us matters of alleged evasion of registration, the Department must decide whether to commit resources to prosecutions when the Supreme Court may declare the registration scheme unconstitutional 3/ and what the announced position of the Executive Branch may seem somewhat inconsistent with universal male registration.

In the absence of any contrary direction, we intend to review the matters referred by Selective Service, initiate investigation by the Federal Bureau of Investigation when warranted, and refer meritorious matters to

3/ Selective Service predicts that the Court will issue an opinion in late June.

appropriate United States Attorneys Offices for prosecution. Further, we will coordinate with the United States Attorneys on the handling of the initial cases to ensure relative uniformity on the Department's approach to major legal and procedural issues. Nevertheless, since such referrals, investigations, and prosecutions are likely to generate intense press and judicial scrutiny, we would appreciate assurance that our proceeding with prosecutions is consistent with Administration policy.

MILITARY MANPOWER TASK FORCE

The Pentagon
Arlington, Virginia

April 12, 1982
4:04 p.m.

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P R O C E E D I N G S

CHAIRMAN WEINBERGER: All right. We have a reasonably short agenda today, and I'm sorry to have missed last week, being away on what Evans Novak calls my interminable trips, but we have a very happy result at least so all is well I'm sure.

This is now the seventh meeting, and we are going to consider today a number of suggestions for the final report, and we have a couple of major items. One are the methods of adjusting military pay, and the other is what we are doing to do with the registration problems and compliance with those, and some facts and figures on the status of the situation now, how many are unregistered and whether or not we are getting increasing numbers or what the situation is, whether

it is stabilized and what we are going to do about the ones that have not yet registered, but we do have first the problem of one of the major open issues which is the mechanism for adjusting military pay, and this is pretty important because for many years this was shamefully low and caused all kinds of morale problems and problems in connection with recruiting and retention and training and everything else so if you would open that up.

• • •

GENERAL TURNAGE:

At the last meeting of the Task Force, sir, which you missed, we talked about some options. We talked about continuing the status quo and based on the best guesstimate that could come out of the system, we talked about increasing the publicity and we know that the system is responsible to the public awareness or the publicity angle which would account for about $700,000, and then we talked about active identification using different sources. One was the federal data, and when we speak of federal data, we are really talking about three or four increments. We talk about the use of Social Security account numbers which was authorized by the Congress in December of last year. We are talking about the use of Internal Revenue Service computer data to get current addresses of people who, the age

group that we are concerned with, and we are speaking of matching files against OSD computer tables which show people that are in the service as well as those of the Coast Guard, and we figure that we can get somewhere between 95 and 98 percent of that.

That particular option was approved at the last meeting, and we started the implementation of it with one exception. Mr. Meese stated that instead of spending the $900,000 to work with Social Security for the use of their files, he would appeal to their patriotism and it has worked wonders. They turned out, confirming their patriotic spirit, to me, except I have to tell you, they asked for how long?

MR. MEESE: How long they should be patriotic?

GENERAL TURNAGE: So right now we are actually in the process of working with the Social Security system for the matching

of the system, and we can't get on with it to the extent we want to until we get the backlog in our own data center caught up. We expect that to be about 1 May.

CHAIRMAN WEINBERGER: Do we have any statutory prohibitions against using any of the federal data?

GENERAL TURNAGE: No, sir, not to our knowledge, now because as I say, the Congress gave that authority in its authorization bill in December.

CHAIRMAN WEINBERGER: For everything?

GENERAL TURNAGE: For Social Security specifically for Selective Service.

CHAIRMAN WEINBERGER: What about Census?

GENERALTURNAGE: Oh, historically it has been so, and there is no problem with that, sir.

MR. MEESE: You can't get individual names off Census.

CHAIRMAN WEINBERGER: I meant for

enforcement purposes.

MR. MEESE: You can get IRS and Social Security.

CHAIRMAN WEINBERGER: So the estimated compliance, that is the total compliance with a rise to 98 percent if you could get federal data?

GENERAL TURNAGE: That is what we estimate, and we have left a data here, a factor here, Mr. Chairman, simply because the Census data we find is not that definitive. For example, at one time when they had the first 1981 registration period, they came up with what they thought was 95 percent compliance, and then a few weeks later Census said we made a mistake in our estimate, and it affected our data by 4 percent, so it dropped it back down to 91 percent, so we think it is necessary for accuracy to have some kind of latitude here, but with what we are doing right now we think we are going to get

somewhere between 95 and 98 because overall now we are at 94 actually.

CHAIRMAN WEINBERGER: What about non-federal then?

GENERAL TURNAGE: Well, in this case here, we have to pay for those files that we use from the civilian sources, and secondly, we only used those where wc find that we are not getting the degree of coverage that we think is necessary from the Social Security files.

CHARIAMN WEINBERGER: What are you using?

GNERAL TURNAGE: We think in terms of license, driver's license figures, and some states will provide that to us, and some states won't.

CHAIRMAN WEINBERGER: What about the best of all?

CENERAL TURNAGE: Social Security?

CHAIRMAN WEINBERGER: Birth certificates.

MR. NISKANEN: They don't identify location.

CHAIRMAN WEINBERGER: They are required in almost every state and they have such simple data as date of birth.

GENERAL TURNAGE: I am embarrassed to tell you I can't answer it, but I will have it for you soon.

CHAIRMAN WEINBERGER: If you could get that, it would seem to me you could drop everything else because everything else is a piece of that. I don't know of any state that doesn't require birth certificates.

MR. GREENBERG: It is the question of being computerized that is critical.

CHARIMAN WEINBERGER: There may be some that don't have it, but you have got pretty good data by year.

GENERAL TURNAGE: I don't know, but let me pursue it. I will find the answer to that, but in any event, something else that has

become a very profound issue in recent weeks has been this business of withholding federal benefits, and I should suggest that we looked into that, and at first blush, we had the impression that the numbers involved were not sufficiently significant to justify the administrative follow-up that would be necessary in order to determine it.

However, now we find out that by age group, 18, 19 and 20, those that we are particularly interested in, we have something like a million, 100,000 involved in that. For example, we looked at the areas of federal employment, Unemployment Compensation, VA dependent benefits, Social Security survivor benefits, CETA program, and student loan and grant program.

CHARIMAN WEINBERTER: This is something the state Senator from New York has been pushing.

DR. KORB: John Markey.

CHAIRMAN WEINBERGER: He is very anxious that we withhold benefits and presumably would be willing to cooperate by withholding New York benefits.

MR. MEESE: You could have a line on each of the applications--have you registered for the draft? And if they put no, then you withhold their benefits. If they put yes, then you get a few that have done it fraudulently, you can kick them off their benefits and prosecute them.

GENERAL TURNAGE: Some Congressman has a bill in the Congress now relating to this fact. Senator Hayakawa called last week. He is interested in withholding all exucational benefits which is substantial. You are talking in terms of something like 600,000.

MR. MEESE: Just having that question on there might make them think twice.

GENERAL TURNAGE: Where we stand now, the current law specifies maximum penalty

onthe basis of discussion that we had with Lowell Jensen of Justice and Mr. Meese, particularly to keep out the off again, on again psychological aspect of the program, to get on with it. We are hopeful that there won't be any change inthis situation for the foreseeable future, once again simply because of the impact of trying to get the program going back on track.

We have had several proposed changes to include the Aspin, the Solomon, and I suggested the Hayakawa, and others. At the last meeting while we considered this, I think this has been deferred at least for the time being.

What I would hope that the Task Force would consider is the possibility of retaining this for at least the time being so that once again there won't be any turbulence in the implementation of it, and then possibly the adding on of one of these denial of

benefits provisions which would once again it seems to me deny benefits for those who fail to accept responsibility.

CHAIRMAN WEINBERGER: How many are now subject to prosecution?

GENERAL TURNAGE: Something just a little less than half a million, sir.

CHAIRMAN WEINBERGER: And it is not going down,I take it, in total number?

GENERAL TURNAGE: Yes, sir.

CHAIRMAN WEINBERGER: It is?

GENERAL TURNAGE: At the end of December it was over a million.

CHAIRMAN WEINBERGER: Over a million?

GENERAL TURNAGE: Yes, sir.

CHAIRMAN WEINBERGER: Would you think it will continue to go down or is this the hard core so to speak?

GENERAL TURNAGE: I just think absolutely. It is going to go down.What will happen is this. When we get the matches and

then get the names and identify those who are possible non-registrants, the first act we take in concert with Justice is send these people letters. Based on the experience factor we have had heretofore, automatically we get over 50 percent of those who comply right away, so in speaking with Mr. Smith and wtih Lowell Jensen and the rest of them, we have a hunch that is the first key. It is the identification of the guy who did it, and then go with that.

In the second blush, we will go with the second letter, more strongly worded, saying you had your chance. The third thing, the thing goes to Justice. Now we have some of those that are holding at Justice right now waiting until we can cleanse the data bank.

CHAIRMAN WEINBERGER: Have we had any prosecutions?

GENERAL TURNAGE: The minute that we

determine precisely whether they didn't register during the grace period we spoke about, they are the ones that Justice will go after. We think a few cases will get the word out that we mean business and we think we are going to have all kinds of business.

CHAIRMAN WEINBERGER: You are at roughly average now 94 percent compliance?

GENERAL TURNAGE: Yes, sir.

CHAIRMAN WEINBERGER: But the 1964 class is almost 100 pecent?

GENERAL TURNAGE: Yes, sir. What happens is that we think that when all of the advertising and the impact was going on, some of these young men we know registered before they had to register so that figure changes every time we get an input from the Post Office because we take a proportinate share of the '64 population and keep adjusting that.

CHAIRMAN WEINBERGER: I see, so what we

have now are backlogs of people who didn't register when either there was some uncertainty or when they felt there was some confusion or one thing and another, and that has been sharply reduced but there still are about a half a million, some of them dating back quite a ways?

GENERAL TURNAGE: To Sixty.

CHAIRMAN WEINBERGER: Is there a statute of limitation problem?

GENERAL TURNAGE: No, sir.

MR. MEESE: When they register, do they get any notification of their registration having been received?

GENERAL TURNAGE: Yes, sir. Within 90 to 120 days we send them a letter. This letter contains two things. It contains all the data that we received from the original registration card and would say confirm this, and if it isn't right, send it back in this envelope we provide for any corrections.

In addition, if they had no corrections, then we say in the event you have a change of address anywhere in the next year, then send this to us so in fact there is a piece of paper, and it is in their hands, and many times we get it back confirming.

MR. MEESE: Does that have a number?

GENERAL TURNAGE: Yes, sir. It has a number on it. For example, we get many inquiries these days from others and fathers who don't know whether or not their youngster has registered and they say we want to confirm this. We go to our files, we give the number, and it satisfies them.

MR. MEESE: So that for federal benefits you could actually ask for their registration?

GENERAL TURNAGE: For the number, and while they don't have the old draft card per se, they have got in effect a letter they could show or show a number.

SECRETARY ORR: You don't give them a

card to carry in their wallet?

GENERAL TURNAGE: No, sir, we don't.

CHAIRMAN WEINBERGER: Is the failure to supply the new address subject to penalty?

GENERAL TURNAGE: It is also a felony. We think that is overkill. However, once again, we think that part of the problem with the system as we assess it has been the changes and perceptions for change, so we would like to leave it alone for the time being.

CHAIRMAN WEINBERGER: All right. Any other questions?

MR. HERRINGTON: When is the first felony prosecution planned?

MR. MEESE: You won't be here!

GENERAL TURNAGE: You should be on Phil Donahue, John! No. I think it is going to be some time in June or July, and once again, the individuals who already were in the Justice files where some investigation

has been made, when we determine that they didn't register during the grace period, we will notify Justice of that and those will be the guys that we go after first, so we hope in June or July.

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Turnage - letter 4/1/82 to Admiral Hayes, U.S. Coast Guard.

SELECTIVE SERVICE SYSTEM
National Headquarters/Washington, D.C. 20435

April 1, 1982

MEMORANDUM TO ADMIRAL BOHN B. HAYES, COMMANDANT, UNITED STATES COAST GUARD

VIA: Andrew L. Lewis, jr., Secretary of the Department of Transportation

Subj: Use of the Coast Guard Personnel Management Information System in the Military Selective Service Act Registration Compliance Program

Pursuant to Section 3 of the Military Selective Service Act (50 U.S.C. App. 453) and Presidential Proclamation 4771 of 2 July 1980, 45 Fed. Reg. 45247 (3 July 1980), male citizens of the United States and other males residing in the United States must register with the Selective Service System upon reaching the age of 18 years. The Selective Service System is responsible for administration of the registration process and for assurance of maximum compliance with

the law.

In accordance with direction from the Administration and the recommendation of the President's Military Manpower Task Force, we have developed a registration compliance program which is based upon computerized matching of individual records maintained by various federal agencies, including the Coast Guard. All details concerning the participation of your organization were developed after consultation between our staffs. A general description of the entire compliance program is found in a report prepared for the Office of Management and Budget pursuant to the OMB guidelines dated 30 March 1979. A copy of our report is attached to this memorandum.

We need your assistance to proceed with the program in the manner outlined in the report to OMB. Specifically, we will need to match our Suspected Violator Inventory

System, Record System SSS-8 against the Coast Guard Record System No. DOT/CG 624 "Personnel Management Information System (PMIS)" and Coast Guard Record System No. DOT/CG 678 "Reserve Personnel Management Information System (Automated)". PMIS and CG 678 will be used to identify those men in Record System SSS-8 who are on active duty with the Coast Guard or exempt from registration under 14 U.S.C. 711. Active duty and reserve Coast Guard personnel are not required to register and will be removed from the SSS-8 system.

While the exact details of the match can be worked out in future consultations between our respective staffs, generally, we need the following information from Record PMIS and CG 678:

(a) the name of each male who was born in 1963 who is on active duty with the Coast Guard, or is in the Coast

Guard Reserve;

(b) the man's social security account number; and

(c) the man's date of birth.

In order that we may implement the program no later than June 1, 1982, it is necessary to establish the details of the matching program arrangements between the Selective Service System and the various other agencies to be involved in the program. Your designation of a central contact point within DMDC and establishment of an agency priority for the work would materially aid in the implementation of the program in a timely manner.

Within Selective Service, responsibility for the compliance program has been assigned to Mr. Edward A. Frankle, Associate Director for Policy Development and Administrative Legal Systems. He may be reached by telephone at 724-0844.

Thank you for your cooperation in implementing this important program

/s/
Thomas K. Turnage
Director

Turnage - letter 4/1/82 to Lawrence Korb, Asst. Secretary of Defense

SELECTIVE SERVICE SYSTEM
National Headquarters/Washington, D.C.20435

April 1, 1982

MEMORANDUM TO LAWRENCE J. KORB, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER, RESERVE AFFAIRS AND LOGISTICS

Subj: Use of the Defense Manpower Data Center Data Base in the Military Selective Service Act Registration Compliance Program

Pursuant to Section 3 of the Military Selective Service Act (50 U.S.C.App. 453) and Presidential Proclamation 4771 of 2 July 1980, 45 Fed.Reg. 45247 (3 July 1980), male citizens of the United States and other

males residing in the United States must register with the Selective Service System upon reaching the age of 18 years. The Selective Service System is responsible for administration of the registration process and for assurance of maximum compliance with the law.

In accordance with direction from the Administration and the recommendation of the President's Military Manpower Task Force, we have developed a registration compliance program which is based upon computerized matching of individual records maintained by various federal agencies, including the Defense Manpower Data Center (DMDC). All details concerning the participation of your organization was developed after consultation between our staffs. A general description of the entire compliance program is found in a report prepared for the Office of Management and Budget pursuant to the

OMB guidelines dated 30 March 1979. A copy of our report is attached to this memorandum.

We need your assistance to proceed with the program in the manner outlined in the report to OMB. Specifically, we will need to match our Suspected Violator Inventory System, Record System SSS-8 against the Defense Logistics Agency Record System No. S 322.10 DLA-LZ "Defense Manpower Data Center Base." Record System No.S 322.10 DLA-LZ will be used to identify those men in Record System SSS-8 who are on active duty with the armed services. Active duty personnel are not required to register and will be removed from the SSS-8 system.

While the exact details of the match can be worked out in future consultations between our respective staffs, generally, we need the following information from Record Systems S 322.10 DLA-LZ:

(a) The name of each male who was born

in 1963 who is on active duty with each branch of the military services;

(b) The man's Social security account number; and

(c) the man's date of birth.

In order that we may implement the program no later than June 1, 1982, it is necessary to establish the details of the matching program arrangements between the Selective Service System and the various other agencies to be involved in the program. Your designation of a central contact point and establishment of an agency priority for the work would materially aid in the implementation of the program in a timely manner.

Within Selective Service, responsibility for the compliance program has been assigned to Mr. Edward A. Frankle, Associate Director for Policy Development and Administrative Legal Systems. He may be reached by telephone

at 724-0844.

Thank you for your cooperation in implementing this important program.

/s/
Thomas K. Turnage
Director

Copy of amendment to Selective Service Act to facilitate registration.

Dec. 1 DEPARTMENT OF DEFENSE P.L.97-86

FACILITATION OF SELECTIVE SERVICE REGISTRATION AND OF MILITARY RECRUITING

Sec. 916. (a) Section 3 of the Military Selective Service Act (50 U.S.C.App.453) is amended--

(1) by inserting "(a)" after "Sec.3."; and

(2) by adding at the end thereof the following subsection:

"(b) Regulations prescribed pursuant to subsection (a) may require that persons

presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe."

(b) Section 12 of such Act (50 U.S.C.App. 462) is amended by adding at the end thereof the following new subsection:

"(e) The President may require the Secretary of Health and Human Services to furnish to the Director, from records available to the Secretary, the following information with respect to individuals who are members of any group of individuals required by a proclamation of the President under section 3 to present themselves for and submit to registration under such section; name, date of birth, social security account number, and address. Information furnished to the Director by the Secretary under this

subsection shall be used only for the purpose of the enforcement of this Act".

(c) Section 15 of such Act (50 U.S.C.App. 465) is amended by adding at the end thereof the following new subsection:

"(e) In order to assist the Armed Forces in recruiting individuals for voluntary service inthe Armed Forces, the Director shall, upon the request of the Secretary of Defense or the Secretary of Transportation, furnish to the Secretary the names and addresses of individuals registered under this Act. Names and addresses furnished pursuant to the preceding sentence may be used by the Secretary of Defense or Secretary of Transportation only for recruiting purposes".

REPORTS ON UNIT COSTS OF MAJOR DEFENSE SYSTEMS

Sec. 917. (a)(1) The program manager (as designated by the Secretary concerned)

for each major defense system included in the Selected Acquisition Report dated March 31, 1981, and submitted to the Congress pursuant to section 811 of the Department of Defense Appropriation Authorization Act, 1976 (Public Law 94-106; 10 U.S.C. 139 note), shall submit to the Secretary concerned, within seven days after the end of each quarter of fiscal year 1982, a written report on the major defense system included in such selected acquisition report for which such manager has responsibility. The program manager shall include in each such report--

(A) the total program acquisition unit cost for such major defense system as of the last day of such quarter; and

(B) in the case of a major defense system for which procurement funds are authorized to be appropriated by this

Act, the current procurement unit cost for such major defense system as of the last day of such quarter.

(2) If at any time during any quarter of fiscal year 1982, the program manager of a major defense system referred to in paragraph (1) has reasonable cause to believe that (A) the total program acquisition unit cost, or (B) in the case of a major defense system for which procurement funds are authorized to be appropriated by this Act, the current procurement unit cost has exceeded the applicable percentage increase specified in subsection (b) such manager shall . . . .

95 STAT. 1129

DECLARATION OF RICHARD R. ROMERO

I, RICHARD R. ROMERO, declare:

1. I am an Assistant United States Attorney for the Central District of California and have been assigned the case of United States v. David Alan Wayte, No. CR 82-630-TJH

2. In September 1981, the United States Department of Justice referred the Wayte case, together with other Selective Service cases, to the United States Attorney's Office for the Central District of California for prosecution.

3. On October 15, 1981, I sent a warning letter (Exhibit D) to Wayte.

4. On June 16, 1981 I received a teletype from the Department of Justice addressed to all United States Attorneys, stating that Selective Service cases

should be handled on a priority basis and requested that any indictments that were appropriate to be returned by the end of June.

5. I declare under penalty of perjury that the foregoing is true.

DATED: This 22nd day of September, 1982.

/s/
RICHARD R. ROMERO

DECLARATION OF RICHARD R. ROMERO

I, RICHARD R. ROMERO, declare:

1. I am an Assistant United States Attorney for the Central District of California and have been assigned the case of United States v. David Alan Wayte, No. CR 82-630-TJH.

2. In September, 1981, the Wayte case, together with other cases, was received by the United States Attorney's Office in Los Angeles.

3. On October 15, 1981, I sent Wayte a letter warning him, among other things, that he was subject to prosecution if he did not register within three weeks.

4. I presented the Wayte case to the grand jury solely because the evidence established that Wayte had violated the draft registration laws.

5. A total of thirteen Selective Service cases have been referred by the Department of Justice to the United States Attorney's Office in Los Angeles. Nine have been declined for prosecution. One was referred to another district for possible prosecution. Two are pending a prosecutorial decision, and one has been prosecuted (Wayte's case). Of these thirteen cases, only Wayte's case and another case involved subjects who have spoken publicly in opposition to draft registration. In this other case involving a subject who has spoken publicly in opposition to draft registration, prosecution was declined when the subject registered after receiving a warning letter from the United States Attorney's Office.

6. Regarding the nine cases in which prosecution was declined, five registered after receiving a warning letter from the United States Attorney's Office. One enlisted in the United States Air Force, two were too old to be subject to the draft. Lastly, one subject could not be located, and it appeared that there was no such person.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 23rd day of September, 1982.

/s/
RICHARD R. ROMERO

STEPHEN S. TROTT
United States Attorney
RICHARD R. ROMERO
Assistant U.S. Attorney
312 North Spring Street
Los Angeles, California 92189
Telephone: 213-688-6527

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 82-630
Plaintiff,	)	AFFIDAVIT OF DEPARTMENT OF JUSTICE ATTORNEY DAVID J. KLINE
vs.	)	
DAVID ALAN WAYTE,	)	
Defendant.	)	

DISTRICT OF COLUMBIA) ss.

I, DAVID J. KLINE, being first duly sworn, do hereby depose and say:

1. I am employed by the General Litigation and Legal Advice Section of the Criminal Division in the United States Department of Justice as the Senior Legal Advisor for

Crimes Against Government Operations, a position I have held since February 1980. I have been employed by the Department since August 4, 1974.

2. In my position as Senior Legal Advisor, I am responsible for rendering advice on, and otherwise administering and supervising the administration of, numerous federal statutes which prohibit crimes generally falling within the category of crimes against government operations. These statutes include, among others, the statutes prohibiting threats against, assaults on, or murder of the President; counterfeiting; forgery; assaults on Federal officers; wiretapping; theft of government property; postal depredations; etc. I am a first level supervisor of attorneys within the General Litigation and Legal Advice Section when these attorneys perform legal advice functions within my assigned area. I engage in

litigation, including litigation of immigration cases. I draft legislation as needed and otherwise fulfill the function of senior attorney for the General Litigation and Legal Advice Section of the Criminal Division.

3. On or about July 18, 1980, James S. Reynolds, the Section's .rincipal Deputy Chief, informed me that the statute penalizing the failure to register with the Selective Service System (50 U.S.C. App. § 462) was added to the statutes already within my assigned area. Three days later, on July 21, 1980, registration with the Selective Service System began pursuant to Presidential Proclamation 4771.

4. Several times in the following months, I communicated with Edward A. Frankle, then the Selective Service's Associate Director for Policy Development and Administrative Legal Systems, so I could ensure that the Department of Justice was prepared

when the Service was ready to refer matters to us for investigation.

5. On May 26, 1981, in a meeting with Selective Service representatives Edward Frankle and Henry Williams, who is General counsel, I learned that the Service intended to refer 75 to 100 alleged non-registrant matters to the Department of Justice in mid-June for investigation and possible prosecution.

6. On June 25, 1981, the Supreme Court, in the case of Rostker v. Goldberg, upheld the registration scheme against a sex-discrimination challenge.

7. I began the process of drafting a memorandum concerning prosecution policy in Selective Service non-registration cases. The policy, as revised, was signed by the Assistant Attorney General on August 17, 1981. It is attached to this affidavit as Attachment A.

8. On July 20, 1981, the Selective Service System referred the names of 132 possible non-registrants to the Department of Justice. The referrals consisted of 132 files contained in an open cardboard box. They were carried into my building by Edward A. Frankle, then an Associate Director of the Selective Service System. As I recall, the only other person from the Department of Justice who was present at the meeting was Special Agent John McNabb from the Federal Bureau of Investigation.

9. Several days later, Mr. Frankle referred to me two more files which had been inadvertently omitted from the box containing the initial referrals.

10. The referrals were files of possible non-registrants that the Service learned "passively," that is, persons who were brought to the Service's attention. Those who found their way into the Service's

passive enforcement program got there two ways: (1) they reported themselves or (2) others reported them. In instances in which the Service had an adequate address, it sent the alleged non-registrant a letter and a registration form. In the event that the alleged non-registrant continued to refuse to register, the Service referred the matter to us. It also referred matters involving non-registrants when it had no sufficiert address.

11. I reviewed the files to determine as best I could whether the persons were within the class of persons who should have registered. I also examined the files to determine what problems might exist if the Department referred the matters for investigation and prosecution.

12. As a result of my examination, I decided to refer 105 of the files to the Federal Bureau of Investigation and

appropriate United States Attorneys' offices. One such file concerned Mr. David Wayte. Of the remaining twenty-nine names, twenty-four were referred to the Selective Service System by the Immigration and Naturalization Service's Galveston Border Patrol Office. When I contacted the responsible Border Patrol officer, he informed me that the persons referred were generally aliens and that they were probably no longer within the United States. Consequently, I referred these names to the INS and requested that it tell us whether the aliens were still within the United States, and, if so, what their present addresses are. Of the remaining five names, two were of persons who registered subsequent to the Selective Service referral to us, and one person was discovered not to be within the class of persons who must register. The remaining two files referred by Selective Service

contained letters from alleged non-registrants, but no return addresses and no envelopes. Consequently, those files contained insufficient information to begin investigations.

13. I had a Department of Justice librarian go through the 105 files and determine the appropriate United States Attorney's offices to send them to.

14. I prepared a form transmittal letter to United States Attorneys, finished an "essential elements" memorandum prepared primarily by another attorney, and obtained other appropriate material. I had my secretary photocopy the files and send the photocopies along with the transmittal letters and enclosures to the United States Attorneys identified by the Department of Justice librarian.

15. On August 24, 1981, I hand-carried to Federal Bureau of Investigation Special Agent John McNabb the 105 original files

referred by the Selective Service System.

16. On October 21, 1981, the Service referred 49 more files to me. I handled these in substantially the same manner as the initial 134 referrals. After reviewing them to see if the persons were probably within the class of individuals who had to register but who failed to do so, I had the files reviewed by a Department of Justice librarian to determine which United States Attorneys' offices they should be sent to. On November 18, 1981, I hand-carried 46 of the files to Special Agent John McNabb of the Federal Bureau of Investigation. Of the remaining files, two appeared to involve illegal aliens who might no longer live within the United States, and one person registered prior to the Service's referring his file to me. I recollect that the Service informed me that another person had registered and that I had my secretary so inform the Federal Bureau

of Investigation. Consequently, I had my secretary send 45 files with cover letters and enclosures to the appropriate United States Attorneys' offices. Of the two apparent illegal aliens, one apparently registered during the grace period (see below), and I referred the other to the Immigration and Naturalization Service for a determination (1) whether he is still in the United States and (2) if so, what his present address is.

17. On or about December 9, 1981, the Department of Justice directed United States Attorneys to seek no indictments in non-registrant matters until the Department issued further directions.

18. On January 7, 1982, the President announced the continuation of Selective Service registration and declared a grace period for persons who registered late.

19. On January 20, 1982, Selective Service, after consultation with the Department of Justice, declared that the grace period would extend through February 28, 1982.

20. On May 14, 1982, Selective Service informed us of those who registered from among its 183 original referrals. After reviewing my records, I identified which matters still remained active, that is, the persons whom our records showed still might be within the class of people who were required to register but who had failed to do so. There were seventy. On June 8, 1982, the Department sent letters, referring again those who had not registered during the grace period, to United States Attorneys in whose districts the matters remained active. 1/

1/ The only exceptions were the result of inadvertent omissions. There were three such matters. Upon my discovering the omissions, I immediately caused letters to be sent. There may have been a few other matters which, because of either erroneous information in the file or mistaken handling, were sent after June 8, 1982.

Since Mr. Wayte was one of those who did not register, he was referred again to the United States Attorney in the Central District of California as a possible violator of 50 U.S.C. App. § 462.

21. Also on may 14, 1982, the Service referred 103 more names of possible non-registrants to the Department of Justice. I handled these matters in substantially the same manner as the Summer and Fall, 1981, matters were handled when they were initially referred to me.

22. On June 15, 1982, the Department of Justice sent a teletype message, which I prepared, to all United states Attorneys. In that message, the Assistant Attorney General for the Criminal Division said that the Department was concerned that "any significant delay in instituting prosecutions will impact adversely on the registration scheme and result in an increase in numbers

of persons who refuse to register." He requested that the matters be handled on a priority basis.

23. My best recollection is that in early July of 1982, I spoke with Assistant U.S. Attorney Richard Romero, and he informed me that his office would seek an indictment of Mr. David Wayte later that month.

24. Neither I, nor to my knowledge, anyone in the Department of Justice in Washington, D.C., provided the matter involving Mr. Wayte with any special treatment. Neither I, nor to my knowledge, anyone in the Department of Justice in Washington, D.C., chose the matter involving Mr. Wayte as one of the first to be presented for indictment. Indeed, I specifically avoided attempting to influence either the order in which persons would be indicted or the districts in which such indictments would occur.

25. At the time of my referring the file to the Federal Bureau of Investigation and the United States Attorney for the Central District of California, I knew no more about Mr. Wayte than was contained in the material referred by the Selective Service System.

26. I referred the file concerning Mr. Wayte to the Federal Bureau of Investigation and the United states Attorney for the Central District of California for no reason other than that it appeared that he had violated federal law by failing to register with the Selective Service System.

/s/
DAVID J. KLINE

Sworn to and subscribed before me
this 21st day of September, 1982

/s/
NOTARY PUBLIC

My Commission Expires March 14, 1983

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID ALAN WAYTE, Defendant.	NO. Cr. 82-630 AFFIDAVIT OF D. LOWELL JENSEN ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION UNITED STATES DEPARTMENT OF JUSTICE

DISTRICT OF COLUMBIA) ss:

I, D. LOWELL JENSEN, first being duly sworn, state that:

1. I am the Assistant Attorney General of the Criminal Division in the United States Department of Justice. I have been the Assistant Attorney General since April 1981. Prior to my employment with the Department of Justice, I was the District Attorney for Alameda County, California.

2. As the person in charge of the Criminal Division, I was and am responsible for creating prosecutive policy for the

prosecution of persons who are required to register with the Selective Service System but who refuse to do so.

3. Decisions concerning such prosecution policy and its implemention have all been made in the Criminal Division. The only exception was the decision concerning the timing of the start of the prosecutive efforts. In a June 19, 1981, memorandum, the Associate Attorney General stated that he had "decided, as [the Criminal Division] . . . suggested, that [the Government] should initiate nonprosecutions until the Supreme Court decides the presently pending case challenging the constitutionality of the current registration provision." (Attachment A). In addition, persons in the Department but outside the Criminal Division were involved with the Division in the decision not to initiate prosecutions until it was determined whether Selective

Service registration would be continued.

4. The Division's policy concerning the prosecution of persons who are within the class of persons who must register with the Selective Service System, but who refuse to do so, is found primarily in an August 17, 1981, memorandum to all United States Attorneys. (Attachment B). Since the creation of policy is an on-going process, it is also reflected in memoranda and letters. Those memoranda and letters originated in the General Litigation and Legal Advice Section.

5. The reasons for the policy decisions are reflected in those letters and memoranda. In particular, the reasons for the Division's policy of prosecuting alleged non-registrants identified pursuant to Selective Service's "passive enforcement" system are reflected in a memorandum typed March 19, 1982, from Lawrence Lippe, Chief

of the General Litigation and Legal Advice Section, to me. (Attachment C. The excision reflects the excision authorized by the court during the selective prosecution hearing in United States v. Sasway, Crim. Case No. 82-0504 GT, in the Southern District of California).

6. I have assigned implementation of the enforcement efforts concerning the Selective Service non-registrants to the General Litigation and Legal Advice Section.

7. Except as noted in paragraph three above, no person or persons outside the Criminal Division directed me to engage or not to engage in any prosecutions, and no person or persons outside the Division directed me to formulate prosecutive policy in any particular way.

/s/
D. LOWELL JENSEN

Sworn and subscribed before me
this 1st day of October, 1982.

/s/
NOTARY PUBLIC
My Commission Expires
August 31, 1983

JOINT APPENDIX

Office Supreme Court, U.S.
FILED
APR 18 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1292

In The

Supreme Court of the United States

October Term, 1983

DAVID ALAN WAYTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Attorneys for Petitioner
(additional counsel on next page)

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Department of Justice
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(202) 633-2217

Counsel for Respondent

PETITION FOR CERTIORARI FILED
FEBRUARY 2, 1984
WRIT OF CERTIORARI GRANTED
MAY 29, 1984

Vol. III of III

BEST AVAILABLE COPY

BURT NEUBORNE
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1537 West Beverly Boulevard
Los Angeles, California 90026

TERRY AMDUR
1939 Rosemont Street
Pasadena, California 91107

Attorneys for Petitioner

VII.

DEFENDANT'S EXHIBITS - TESTIMONIAL HEARING (INDEXED)

Defendant's Exhibit No.	Description	Page
A	Williams Letter 6/17/81	530
B	Dunne Letter 1/15/82	535
C	Reynolds' Memo 9/28/81	537
D	Close Hold draft 2/17/82	541

Selective Service System
National Headquarters
Washington, D.C. 20435

June 17, 1981

Mr. Greg Smucker
3148 E. Benham Ave.
Elkhart, In 46517

Dear Mr. Smucker:

We have received information that you may be required to register with Selective Service under provision of the Military Selective Service Act, but a check of our records indicates that you have not re-registered. The purpose of this letter is to check the accuracy of this information. Please understand that we are required by law to refer possible violators of the Military Selective Service Act to the Department of Justice. If a person is convicted of violation of the Act he may be imprisoned for not more than five years or fined not mor than $10,000 or both.

Generally, a male who is not already in the active Armed Forces is required to register with Selective Service if he was born in 1960, or if born in 1963 or a later year, within 30 days of his eighteenth (18) birthday. If a person required to register fails to do so because of "some condition beyond his control" he must be able to prove that the "condition not under his control" prevented him from registering. If the "condition" changes he has 30 days to register. Generally, having been in prison or confined in a hospital or institution qualifies as a "condition beyond his control."

In order for us to clear our records, and not forward your name to the Department of Justice for investigation by the Federal Bureau of Investigation you must take one of the following actions:

- If, as described above, you are required to register and have not

already done so, please fill in the enclosed form and mail it to Selective Service in the enclosed envelope.

- If, as described above you are required but have not already done so because of a continuing "condition beyond your control", please indicate in a letter mailed in the enclosed envelope your reason for your continued non-registration.
- If, as described above, you are required to register and believe that you have registered, please send us a copy of your Registration Acknowledgement letter (SSS Form 3) or provide us your Selective Service number in the enclosed envelope.
- If, as described above, you do not believe you are required to register please explain why you feel you do not have to register and provide

proof of your status in the enclosed envelope. Proof will vary from case to case but may be a copy of your birth certificate, a DD Form 53 or similar form showing your active duty status in the military, a statement, in English, from the diplomatic agency of the country of which you are a subject explaining why you are not required to register, or other document which supports your claims.

Please note that sending false information in response to this letter may be a violation of the Military Selective Service Act and may subject the sender to the penalties described above.

Let me stress that unless we hear from you within 15 days of the date of this letter we will send your name to the Department of Justice for investigation and

possible prosection. If you have registered or if you are a person who is not required to register we are sorry for any inconvenience this letter may cause you and we appreciate your help in clearing our records.

Sincerely,

/s/
Henry N. Williams
General Counsel

U.S. Department of Justice

United States Attorney
District of Maryland

United States Courthouse
Eighth Floor
101 West Lombard Street
Baltimore, Maryland 21201

RED:cwq

January 15, 1982

Mr. James Perry Brumbaugh, III
14111 Willoughby Road
Upper Marlboro, Maryland 20870

Dear Mr. Brombaugh:

This is to inform you that you are the subject of a criminal investigation for your alleged failure to register with the Selective Service System, as required by law. I must inform you that a willful and knowing failure to register by one who is required by law to register is a violation of Title 50, United States Code, Appendix, Section 462(a). That offense is a felony and is punishable by five years imprisonment and a fine of $10,000.00.

You may avoid further investigation by registering with the Selective Service System by February 5, 1982. A blank registration form and a stamped, pre-addressed envelope is enclosed for tha purpose. If you fail to register by February 5, 1982, the criminal investigation of you will continue. That investigation could result in criminal prosecution.

I encourage you to register promptly by using the enclosed registration form. If you have any questions or comments concerning this matter I would be happy to meet you at a mutually convenient time.

Very truly yours,

J. Frederick Motz
United States Attorney

/s/
Richard E. Dunne, III
Assistant United States Attorney

Enclosures

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

Memorandum

Subject	Date
Selective Service Registration Case	September 28, 1981 JSR:tdj

To	From
Lawrence Lippe, Chief General Litigation and Legal Advice Section Criminal Division	James S. Reynolds Principal Deputy Chief General Litigation and Legal Advice Section Criminal Division

This memorandum updates the information set forth in the attached file memorandum.

OMB has not yet withdrawn its July 31, 1981, letter by which it advised the Senate Appropriations Committee that Selective Service has no legal authority to require registration to supply social security numbers and does not need such numbers. However, on Friday, September 25, 1981, the Civil Division filed a memorandum with the Court of Appeals for the D.C. Circuit

stating that the Attorney General has personally reviewed the matter and has concluded that the position asserted in the Government's brief - that Selective Service has legal authority to require registrants to supply social security numbers - is correct and remains the position of the United States, not withstanding the OMB Letter.

The legislation which would, among other things, make explicit the right of Selective Service to require registrants to provide social security numbers is still pending action by the conference committee. Oral argument before the D.C. Circuit is now set for October 16th. However, the Civil Division is considering requesting that the matter be postponed to give Congress time to conclude its consideration of the legislation. ACLU attorneys have already indicated that they would resist such a request.

According to Leonard Schaitman, the Civil Division attorney handling the civil suit, representative of OMB and the White

House are in the process of trying to work out their differences on the proper means of enforcing the registration requirement. As reflected in Director Stockman's July 31, 1981 letter, OMB opposes "an aggressive compliance program."

At this point, we are continuing to move ahead with the Department's criminal enforcement program. However, pending either passage of the legislation now pending before Congress or a favorable decision by the D.C. Circuit, it appears unwise to proceed with prosecution of a case where the defendant has supplied all informantion but his social security number. (There are probably not more than a few cases in this category. Unfortunately, we cannot identify those cases since we no longer have the Selective Service files on the referred cases.) It is better to get the issue resolved in a civil forum than to litigate it in a criminal

context. Accordingly, unless you disagree I will ask Dave Kline to draft a letter to the U.S. Attorneys who have received Selective Service referrals advising them not to proceed to prosecution on cases where only the social security number has been withheld without first clearing such cases with this Division.

Attachment

CLOSE HOLD
DRAFT
February 17, 1982

Herbert C. Puscheck [handwritten]

INCREASE SELECTIVE SERVICE REGISTRATION COMPLIANCE

ISSUE

What additional steps, if any, should be taken to improve Selective Sevice registration compliance?

INTRODUCTION

The Presidential decision of January 7, 1982, to continue registration was based on an assessment by the Military Manpower Task Force of the time peacetime registration saves if a mobilization becomes necessary. The Task Force also concluded that a mobilization draft would be equitable if men were registered in peacetime.

Failure to register is not a victimless crime. If a mobilization draft is required, a non-registrant reduces the size of the registrant pool, increasing the probability

that a registrant who obeyed the law could be drafted. Thus, non-compliance would cause some men to be drafted because others failed to register. Men register as they turn 18, but do not become eligible for induction until they turn 20. This two-year lag time permits Selective Service to correct errors in the file and build as complete and equitable a registrant pool as possible.

Too little effort to remind young men to register could reduce the number of registrations due to lack of knowledge of the requirement or general apathy. Too much emphasis could cause a resurgence of the "anti-draft" protest movement or produce a flood of debilitating legal actions.

HOW GOOD IS REGISTRATION COMPLIANCE NOW?

It is estimated that about 800,000 men, or about 10 percent of those who should have registered, had failed to do so when the President made his decision. However,

analyses reveal that recent year-groups have produced lower complianc rates than those who registered in mid-1980 and early 1981.

In 1973, at the height of the anti-war movement, 77 percent of those liable for the draft registered on time (within 30 days of their 18th birthday). Final totals reached 99.5 percent. In 1980, 87 percent registered on time (in the two-week period provided), and interim statistics reveal totals of about 93 percent. The one-week registration in January 1981, saw 77 percent register on time, with interim statistics reaching 87.6 percent. The continuing registration process, also begun in January 1981, has resulted in about 72 percent compliance. The figure of 800,000 "delinquent" registrants accounts for all those who should have registered since mid-1980, but have not. However, when the lack of a formal compliance program is

noted, these results might be considered commendable.

The President authorized a grace period for late registrations, in part, because some men may have been confused about what was expected of them. Men may register without penalty until February 28, 1982. Since the U.S.Postal Service forwards completed registrations on a cyclical basis, the final reports tallying grace period registrations will not arrive at the Selective Service data center until Mid-March. Therefore, detailed compliance reports which include registrations during the grace period will not be available until April. However, early reports received since the President's decision are encouraging. More than 224,000 registrations were received during the four-week period from January 11 to February 7 setting a peacetime record for the Agency. If this trend continues,

registration compliance for the 1963 year-of-birth group, the group with poorest compliance to date, should reach at least 85 percent by the end of the grace period.

GOAL

It would be ideal to establish a program which isures that all who should register do so on time. Perfection, however, is rarely achieved and, considering the costs and effort at the margin, the goal of this program should be more modest. Estimates of the registrant population are somewhat uncertain. For example, last year the Bureau of the Census raised its estimate of the number of 18 year-olds by 4 percent), thus a complaince program should be judged successful if about 95 percent of the estimated population registers within one year of their 18th birthday.

BACKGROUND AND DISCUSSION

Recent experience seems relevant to a decision on efforts to increase registration compliance.

In 1973, concern that non-compliance was increasing prompted a major campaign to increase registrations. Hundreds of thousands of posters were distributed and appeared in schools, businesses, busses, bowling alleys and on billboards. Some commercial firms included registration reminders in bill envelopes and at least two states (Texas and Maryland), matched registrants with driver's license lists. This program, basically a State level drive to improve awareness, produced a significant increase in registration compliance, with final totals reaching 99.5 percent of the eligible population.

In August 1981, Selective Service was concerned that registration compliance

was falling. Analysis revealed that the continuous registration begun in January had achieved only 59 to 69 percent compliance. As a result, the Agnecy implemented a large scale campaign to increase awareness, which included mailing postcard reminders to 1.2 million high school seniors, posting registrant lists in city halls and other public buildings, of those who had registered and using the Selective Service network (State Directors, reservists, etc.) to publicize the program. By September 1981, compliance had risen to 77 percent.

In January and February 1982, a second major effort was undertaken to increase compliance and publicize the President's grace period. Postcards were sent to 934,000 high school seniors, thousands of posters were distributed, and support was encouraged from college newspapers and broadcast stations as well as the media at large through

development of updated public service messages. Initial results of this effort are encouraging, but detailed analysis of the impact will not be available until April.

A preliminary analysis of compliance based on geographical distribution of registrations, and demographic factors (urban vs. rural, minorities, unemployement rates, etc.) is now available. It reveals that major urban areas, which contain approximately 30 percent of the 18 year-old population, appear to account for more than 50 percent of the non-compliance. It also shows that in some inner city areas, such as Los Angeles and New York City, only 15 t0 20 percent of the 18 year-old population had been mailed reminder postcards. Since the name lists obtained from commercial sources are compiled from high school senior and driver's license lists, the impact of school drop outs and a lesser requirement for automobiles in the

inner city appear to have an impact. When the eligible population in these areas is subtracted from the total population which should have registered, the compliance rate for the remainder of the population increases to about 85 percent. Low compliance in urban areas is not new. When 1981 registrations are compared to 1974 registrations the results are very similar in the States in which these major urban areas are located.

Low compliance may be concentrated within selected groups, and may be directly related to a lack of knowledge of the requirement or a lack of urgency to register. Accordingly, Selective Service initiated a contract study in May 1981, to assess the motivational aspect of registration. This study, which will be conducted in March and April 1982, will look at three groups: those who registered on time, those who registered late, and those who did not register. The

study will attempt to learn why men register or fail to do so, and what trigger's those decisions. Programs can then be tailored to increase the effectiveness of publicity and awareness campaigns.

The Executive Branch cannot address registration compliance in isolation from other actions. For example, Congressman Gerald Solomon and six co-sponsors have introduced a bill which would deny Federal education assistance, Federal jobs, and other government subsidies, benefits and grants to men who failed to register. Delegate Warren Barry, who also had six co-sponsors, introduced a bill in the Virginia legislature that would bar non-registrants from State subsidized schools. In a few cases, governmental bodies such as the New York State Senate Committee on Finance, have implemented sanctions such as hiring prohibitions against men who fail to register with Selective

Service. Similar actions can be expected elsewhere.

OPTIONS

The following sections describe and assess four actions that can be taken to help improve registration compliance. These options, or type of actions, are:

I. Awareness, Passive Identification and Enforcement. This action continues the publicity program to increase awareness of the registration requirement, and continues the program to identify potential non-registrants, based upon unsolicited reports. Selective Service follows up each report to insure that the men understand their obligations, and, where necessary refer non-registrants to the Deparment of Justice for investigation and possible prosecution. Paid advertising is

also considered as a supplement to public service advertising programs.

II. Option I plus Active Identification. This action continues Option I, and adds a program of active identification of potential non-registrants through use of Federal data (the Social Securtiy Account Number); or through use of local or state government data such as driver's license lists.

III. Federal Agency Data Collection. This action would add a program to seek assistance from other Federal agencies in identifying potential non-registrats, by using administrative mechanisms associated with employment or entitlement programs (such as job applications or college loan applications) to match registration

age men against Selective Service lists.

IV. Sanctions. This action would develop proposals to deny Federal, State or private entitlements (student loans, employment, etc.) to non-registrants.

The action to be taken to improve registration compliance is a decision as to the mix or combination of programs preferred. The following sections explore the advantages or disadvantages of each action shown above.

Option I - Awareness, Passive Identification and Enforcement

Awareness. The Military Manpower Task Force assessment of the registration process noted that the lack of an Administration position on registration had contributed to reduced compliance. The Task Force also believed that a positive awareness campaign was necessary if the program was

to be successful.

Passive Identification and Enforcement. With a program of passive enforcement, Selective Service takes no role in identifying possible non-registrants, but reacts to unsolicited reports of possible violation. Friends, neighbors or concerned citizens contact Selective Service and report alleged non-compliance with the registration requirement. Selective Service attempts to verify these reports, contacts the individuals and, if appropriate, refers the cases to the Department of Justice.

The Military Selective Service Act provides a maximum penalty for violations - including non-registration - of up to five years imprisonment, and/or a $10,000 fine. Some argue that in peacetime this penalty is too severe for non-registration, and rarely, if ever, imposed. Of a few hundred cases referred to Department of Justice in 1973-74,

only two persons were convicted. However, an aggressive enforcement program seeks not to impose legal penalties, but rather to encourage registration. This can be accomplished through a multi-phase process. The key step is identification of non-registrants which, through the mere loss of anonymity, generally leads to completed registration. Once identified, Selective Service contacts the potential non-registrants to inform him of his obligation to register. Experience suggests that about 75% of those who have been identified and contacted register. If the response is negative, Selective Service again contacts the non-registrant advising of the consequences for non-compliance. Those men who persist in refusing to comply are referred to the Department of Justice for investigation and possible prosecution as reported violators. Justice again offers each man the opportunity to register prior

to legal action. The enforcement program is, for the most part an identification and awareness campaign. In the long run, the only non-registrants who end up in court are those who choose to be there. To date, with a passive identification program, about [illegible] have been reported to Selective Service. Of the total, 79 cases were resolved or are awaiting a reply to the Agency's contact to them, and 82 are in research. The remaining 182 cases were referred to the Department of Justice. Justice reports that [illegible] been resolved. Justice was prepared to issue the first indictments under consideration in December 1981, when action was suspended pending the Presidential decision on registration. After the end of the grace period, these 135 names will be checked against the registrant file. Remaining non-registrants will again be referred to Justice where the process will resume.

The Selective Service System can continue the publicity campaign designed to bring knowledge of the of the registration to the target population. A multi-dimensional approach must be used since it is unlikely that any single process could reach all potential registrants. Program emphasis must attempt to increase awareness, reduce apathy, and stimulate registrations, while avoiding excesses which might stimulate anti-registration activities or legal challenge to the process. The attitudinal study mentioned earlier will likely provide insights as to the direction to be taken in future programs.

Option 1A: Continue Publicity, Passive Identification and Enforcement Programs

Coincident with the President's decision in January 1982, Selective Service renewed the awareness campaign with special focus

on the grace period. A new series of public service announcements, posters and mailings stressed the requirement and noted that men who had not registered could do so without penalty until the end of February. Patriotic and veterans organizations were contacted and asked to lend their support to the registration program. Based upon the geographic analysis, twenty metropolitan areas were targeted for special emphasis. State Directors and Region Managers were asked to give these areas special attention for media campaigns and information dissemination. DoD contributed to the publicity campaign by using its communications network to inform active and reserve military communities of the registration requirements. DoD placed emphasis on the requirement for members of the Delayed Entry Program (DEP) and Reserve components to register and remained registration age men separating

from the active service that they too must register. It is too soon to assess the results of this campaign, however, early indications are that it will be successful.

Under this option, Selective Service can continue awareness programs such as high school mailings, postcard reminders, media contacts, use of the Speakers Bureau, and the Selective Service and DoD communication networks. Programs will be directed toward low compliance areas and tailored to encourage registrations among low compliance populations. Compliance is, of course, uncertain but is expected to reach 85% for the past year group (1963) and 80% for the current year group (1964). Actual implementation is dependent upon approval of a pending $1.4M supplemental for FY 1982.

Factors favoring this approach include its relatively low cost and ease of implementation. This campaign keeps Selective

Service registration in the public eye and avoids controversies which might prompt anti-registration activities. There are no real arguments against continuing this approach.

Option1B(1) - Expand Publicity

Under this option Selective Service would expand its planned publicity campaign. Publicity would continue to rely on public service announcements. Special emphasis would go to twenty urban areas where additional direct mailings would be made, and special spot announcements and targeted mass mailings to various groups would be used. Additional costs would be about $500,000, of which $300,000 would be for the spot announcements and mass mailings. Compliance should reach 90% for the past year group and about 85% for the current year group.

Option 1B(2) - Purchase Advertisements or Dirct Mailing

Selective Service could choose to request additional funds for paid *not legible to *not legible additional coverage. However, the cost of blanket paid *not legible is *not legible. It was estimated that paid advertisements to equal the public service *not legible associated with the January 1981 registration, would *not legible of $10 *not legible. However, the Defense Department just completed an effective [illegible] radio campaign at a cost of $600 thousand. Using paid advertisement in some locations and with certain media could reduce the effectiveness of the Public Service campaign, and generate refusals by some stations to run public service ads.

A mass mailing to every household in the United States announcing Selective Service registration could be conducted at an

estimated cost for postage of $7.7 million. The last national direct mailing was conduted in 1917. A mass mailing to increase registrations was completed in Puerto Rico in 1980, at a cost of $95,000 to send 800,000 items. However, this awareness effect did not significantly increase registrations.

Option II - Active Identification

In announcing his decision registration the President said, "...I have instructed the Department of Justice to make provision for a grace period for last registration". The Director of Selective Service, announced the details of the grace period in a statement developed and coordinated with the Department of Justice, which said, "After February 28, and after identifying the names of those persons who registered during the grace period, Selective Service will carry out a program of full compliance with the registration law". The statement suggests

that the Administration supports programs to identify potential non-registrants. If this is correct, then then the question before the Task Force is, What type of active identification program should be implemented? Two options are available:

Option IIA: Federal Sources

One approach to active identification is to implement the authority granted by Congress in PL 97-86, and use the resources of the Federal government to identify violators of the Military Selective Service Act. The bill was signed by the President on December 1, 1981. Implementation is at the discretion of the President. Under the provisions of PL 97-86, Social Security Account Number data could be used to help identify individuals who are required to register. SSAN files would be matched against Selective Service data to identify possible non-registrants. Internal Revenue Service

data would then provide current address information on these individuals. At this point in the process, contacts, reminders, and warnings, similar to the passive enforcement program, would begin. About 75 percent of those identified would register.

The argument in favor of using the authority granted by Congress is that Social Security data provide the most complete coverage available. Over 98% of the eligible 18 year old men have Social Security Account numbers. IRS has current address information for about 85 percent of this group. This approach was advocated by Dr. Curtis Tarr, Director of Selective Service from 1970-1972. There is precedence for this approach, the Department of Agriculture compared its Food Stamp recipient records with Social Security files to identify persons who understated their income. This approach to active identification seems to cover all segments

of the population, lends itself to rapid and economical implementation, and has the support of Congress. This seems to be the best means of enforcing the law. Legal precedent has established that the best means available to enforce a law must generally be used.

Arguments against use of a Federal data source for a enforcement program are that matching SSAN/IRS/SSS tapes is another example of concentrating power in the Federal Bureaucracy and an invasion of individual privacy. The President is firmly against expansion of the influence of the Federal government. There would be some "political costs"connected with implementation of this option.

The additional cost to Selective Service of implementing such a program would be about $300,000 in FY 82, which covers the computer matching, postage and followup. Assuming

15 percent of a year group (about 300,000 men) has not registered, this approach would permit about 250,000 to be identified and contacted.
This would raise compliance from about 85 to 95 percent.[1]

Option IIB: Non-Federal Sources

Selective Service has enforced registration without benefit of Social Security and IRS data. Commercial lists of registration age men could be purchased and used in lieu of SSAN data. Methods could be developed to use computerized lists generated at the State and local level, such as driver's

[1] It has been suggested that this approach could be used to conduct a passive registration program. The suggestion was rejected because it would require a change in the Military Selective Service Act, would not assure provision of correct addresses, and would provide no means for contacting registrants for routine followup or address update.

license and high school graduate lists, to identify potential violators.

A list of about 1.2 million names per year group is available from commercial sources. The quality is adequate for purposes of an awareness program. Certain states, who do not sell lists of names to commercial sources, would make them available to Selective Service. Defense recruiters administer Armed Services Qualification Tests to registration aged persons and data could be provided to Selective Service. It is estimated that a list of about 1.5 million names per year group could be compiled in this manner.

Coverage would vary from state to state, and within states. Some jurisdictions have privacy restrictions that could prevent use of their data. Commercial lists of registrations that could prevent use of their data. Commercial lists of registration age

men are not complete. These factors might preclude Selective Service from developing an equitable compliance program. Use of varying sources, and imprecise methods for matching names and address, could increase the possibility of including persons who are not required to register (women, active service members, and men in out-of-range year groups). Lack of uniform data and a common identifier would make processing difficult. Address data in particular would be non-standard, and might not be current.

Assuming that 85% register as required, it is estimated that this approach could identify about 100,000 possible non-registrants per year group or about 40% the number identified by Option IIA. The cost of this option would be $800,000 higher than Option IA in FY 82, and $1.1 million higher in FY83.

Option III - Federal Agency Data Collection

Selective Service could identify potential non-registrants by matching Federal agency records against the registrant file. Information could be compiled from Federal or State job application forms, applications for college loan or benefit and entitlement programs, lists of entrants into the armed services, or other sources which routinely request background information (age, Social Security Account Number, home address, etc.). Since Selective Service would interact with the agency or office concerned, there would be no direct burden on the individual. To comply with the Privacy Act, the agencies or offices providing the information would have to include Selective Service as a routine user of the information on their forms, which would place a burden on the agencies. One agency estimated it would cost over $1 million to reprint their forms. A

computer match of Federal agency files should not be difficult. Many agencies include the SSAN as part of their record or use it as an identifier. Food stamp eligibility forms include the SSAN for each member of the household.

Selective use of this approach could provide names of possible non-registrants with relative ease. Department of Defense, for example, could provide names of all advanced ROTC students, however, there are only 29,000 advanced ROTC students, thus the yield of possible non-registrants would be small. This approach might reach segments of the registration age population untouched by commercial lists. For example, information collected from benefit programs may reach men from the inner-city who do not appear on student or driver's license lists.

The following list is illustrative of the types of programs from which data might

be collected. The number of 18 year-old men who might be identified is shown. Data collection could be broadened to include other age groups.

18 YEAR OLD MEN RECEIVING FEDERAL BENEFITS

Program	Number
Federal Employment	30,000
Unemployment Compensation	50,000
VA Dependant Benefits	8,500
Social Security Survivor Benefits	60,00
CETA Program	65,000
Student Loan/Grant Program	20,000

The yield from this approach might be too low to make it cost effective. It is estimated that no more than 75,000 of the 300,000 non-registrants mentioned earlier would be identified.

There are disadvantages if the program is conducted on a wide scale. States which

implement a Federally funded program would have to provide data. A restrictive State privacy law, such as in New York or California, California, might hamper collection of data. Some States might not wish to participate in the data collection. Mandated collection efforts might raise constitutional issues.

The additional cost to Selective Service would likely be greater than for option IIB. Detailed estimates have not been developed. It would take several months to implement this approach.

Option IV-Sanctions

It has been argued that the Federal government is inconsistent if it permits men to receive entitlement program benefits (ROTC scholarship, student loans or grants, food stamps, or government unemployment) if they refuse to register with Selective Service.

A sanction program could require registration prior to Federal employment or receipt to Federal benefits. Agencies could require job or benefit applicants to furnish proof of registration. If proof was not available, the agency could query Selective Service to verify an individual's registration status before the person was employed or benefits granted or continued.

Federal programs to which sanctions could be applied are generally the same as those shown in the table in Option III. Some men may possibly be included in more than one program due to the nature of benefit programs. A sanction program would likely identify about 100,000 men per year group, most of whom would probably already have registered. The yield of non-registrants from this population is estimated at 30,000, or 10 percent of the total non-registrants in any given year group.

Compliance could also be increased if the Administration chose to encourage States or the private sector to impose similar job or benefit sanctions. Some State legislatures are considering bills which would require men to prove they had registered before bring enrolled in State colleges and universities. One State agency required prior to a bank granting a loan. State or private sector sanctions would be imposed on a voluntary basis, thus might not be uniform nationwide.

Those who favor sanctions suggest that this approach agrees with the Administration's position on law enforcement (as demonstrated in the recent actions against PATCO), and that sanctions linked to registration tie freedom, rights, and benefits to citizen obligations, and provide a signal that failure to register is a serious offense. In addition, it is suggested that the approach supports the "new Federalism", and

requires minimum Federal intrusion.

Sanctions could raise constitutional issues unless statutes were enacted which required registration as a prerequisite for a Federal jobs or benefits. Agencies might be prohibited from asking questions about registration except to implement a statute. This could limit collection of registration information.

Sanctions could raise constitutional issues unless statutes were enacted which required registration as a prerequisite for a Federal jobs or benefits. Agencies might be prohibited from asking questions about registration except ot implement a status. This could limit collection of registration information.

A sanction program could place a burden upon those Federal agencies which would have to modity forms and increase ADP capabilities. Data verification by Selective

Service would be difficult unless other agency data included the Social Security Account Number or Selective Service Number. In a sanction program, agencies would require an individual to supply his Selective Service registration number when completing their forms. This could imply sanctions for Federal job placement entitlement and benefit eligibility if the individual did not have his registration number and could prompt the non-registrant to register.

A sanction program may discriminate against the poor or minorities who receive Federal benefits, yield relatively few non-registrants, would be difficult to administer, and increase the workload of the agencies involved. Cost of a sanction program has not been computed.

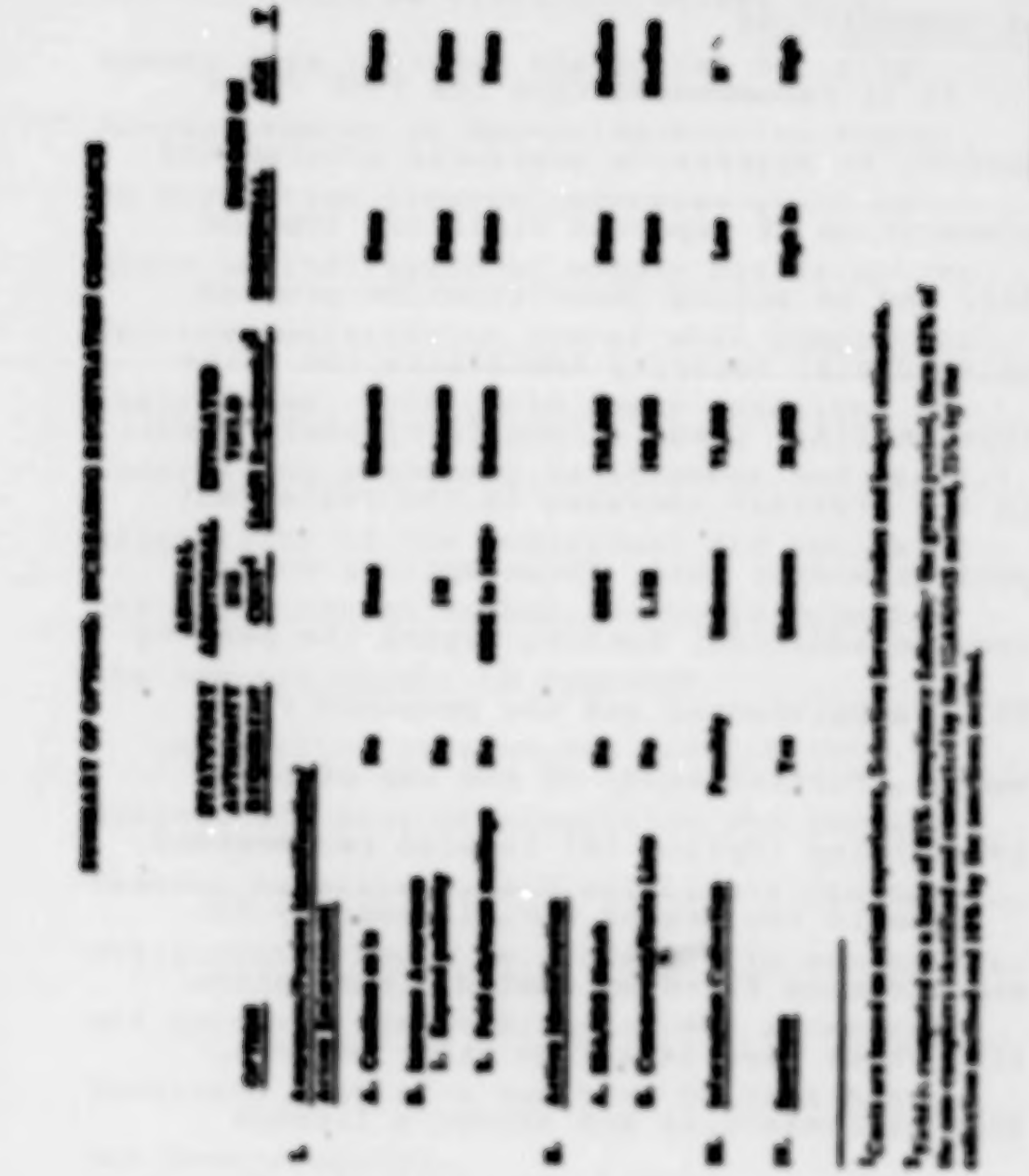
SUMMARY

A summary table is attached.

RECOMMENDATIONS

It is recommended that the Task Force support an aggressive awareness program and prosecution of reported violators (Option IA), and an active identification program using Social Security Administration files (Option IIA). These otions [sic] would result in the greatest increase in the registrant pool at modest cost. These options would require additonal funding beyond the pending FY 82 supplemental and the proposed FY 83 budget. Further study of the use of paid advertising (Option IB) is also recommended.

Should the use of Social Security Administration files be denied, then Option IIB, which uses data from other sources, such as commercial and driver's licence lists, is recommended. It would also be necessary to expand the awareness program (Option IB). These programs are not funded in the FY 82 supplemental.



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VIII.

ADDITIONAL GOVERNMENT DOCUMENTS
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DECLARATION OF THOMAS P. ALDER

THOMAS P. ALDER declares as follows:

1. I am an attorney and publisher of the Military Law Reporter, a function I perform as the President of the Public Law Education Institute, Washington, D.C.

2. On or about April 30, 1982 I had occasion to call Mr. Edward Frankle, Associate Director of the Selective Service System, Washington, D.C.

3. During this phone conversation I asked Mr. Frankle if he knew of a document or documents which would constitute a record of the President's decision to exercise the optional authority conferred upon him by PL 97-86 to direct that Social Security Account files be made available to the Selective Service System to determine the identity of non-registrants

for the draft.

4. Mr. Frankle suggested that I make a formal inquiry for these documents. He further suggested that, to ease identification of the documents, I should refer to a datamatching report forwarded to the Office of Management and Budget in connection with the datamatching request. He then indicated that the decision to order the datamatching had been taken at a meeting held on March 26, 1982. It is my best recollection of this account that he then told me that the meeting was attended by Lowell Jensen, Edwin Meese, and Thomas Turnage. I do not recall that other names were mentioned.

5. I have subsequently submitted, and received replies to, requests for these documents. The documents confirm

that the decision to order datamatching was taken on March 26th. One, a memorandum for Mr. Meese, recounts that he had communicated the President's request for datamatching to the Secretary of Health and Human Services sometime prior to June 3, 1982.

/s/ 10/1/82

Thomas P. Alder

Selective Service System
National Headquarters/
Washington, D.C. 20435

May 18, 1982

Mr. Thomas P. Alder
Dupont Circle Building, Suite 610
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Alder:

We have received your FOIA request dated May 12, 1982 requesting "copies of all documents granting, describing, or recording this express authority" (i.e., to implement the registration enforcement program).

There is no document in which express authority was given to implement the registration enforcement program. Authority was given to the Director, personally.

In the circumstances, the request cannot be fulfilled.

Sincerely,

/s/
Clarence E. Boston
Records Division

MILITARY LAW REPORTER

Dupont Circle Building, Suite 610 1346 Connecticut Avenue, N.W.
Washington D.C. 20036
(202) 296-7590

A Project of the Public Law Education Institute

May 12, 1982

Mr. Clarence E. Boston
Records Manager
Selective Service System
Washington, DC 20435

Freedom of Inforamtion Act Request

Dear Mr. Boston:

I want to thank you for your prompt reply to my request of April 30, and to restate one item of that request.

In the first paragraph of the Director's

March 31, 1982 "Memorandum for the Commissioner, SSA," and again in the April 1, 1982, "Memorandum for the Commissioner, IRS," the Director states that "[o]n March 26, 1982, this agency was given express authority to proceed with the implementation of a registration enforcement program...." By this letter, I am writing to request, pursuant to 5 U.S.C. §552, copies of all documents granting, describing, or reccrding this express authority.

As MLR is a public-service NOT-FOR-PROFIT undertaking of a §501(c)(3) public foundation, I would like to further request that search and copying fees be waived as provided in 5 U.S.C. §552(a)(4). In view of the time value now associated with this follow-up request, I would also ask to receive a reply within 10 days.

Sincerely yours,

/s/
Thomas P. Alder,
President PLEI

TPA:wjs

Selective Service System
National Headquarters/
Washington, D.C. 20435

March 30, 1982

MEMORANDUM TO MR. CHRISTOPHER DeMUTH,
ADMINISTRATOR FOR INFORMATION AND
REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Subject: Report Concerning SSS Matching Program to Identify Registration Violators

Pursuant to OMB Memorandum dated 30 March, 1979, concerning "Guidelines for the Conduct of Matching Programs", the Selective Service System submits the following information concerning its proposed program for computerized matching of individual records maintained by the Social Security Administration, the Internal Revenue Service, The Defense Logistics Agency, the Coast Guard, and the Selective Service System.

(1) The name of the program is "The Selective Service System Registration Compliance Program".

(2) The authority under which this program is to be conducted is Section 12 of the Military Selective Service Act (50 U.S.C. App. 462), as amended by Section 916 of the Department of Defense Authorization Act, 1982; P.L. 97-86, approved 1 Dec 1981; and Presidential Proclamation 4771 of Jul 1980, 45 Fed. Reg. 45247 (3 Jul 1980).

(3) The purpose of the program is to identify those persons who may be violating the registration requirements of Section 3 of the Military Selective Service Act

(50 U.S.C. App. 453).

(4) The record systems to be matched are:

(a) Selective Service System Record System No. SSS-10 "Registrant Registration Records (after 1979) - SSS" published in 45 Fed. Reg. 30587 (8 May 1980).

(b) Selective Service Record System No. SSS-8 "Suspected Violator Inventory System (SVIS) - SSS" published in 46 Fed. Reg. 26727 (14 May 1981). (This record system will be amended as shown in Attachment A to this report.)

(c) Social Security Administration Record System No. 09-60-0058 "Master Files of Social Security Number Holders HHS SSA OEER" published in 46 Fed. Reg. 53784 (30 Oct 1981).

(d) Internal Revenue Service Record System No. IRS 24.030 "Individual Master File (IMF)" published in 46 Fed. Reg. 16463 (12 Mar 1981).

(e) Coast Guard, U.S. Record System No. DOT/CG 624 "Personnel Management Information System (PMIS)" published in 46 Fed. Reg. 59741 (7 Dec 1981).

(f) Coast Guard, U. S. Record System No. DOT/CG 678 "Reserve Personnel Management Information System (Automated)" published in 46 Fed. Reg. 59741 (7 Dec 1981).

(g) Defense Logistics Agency Record System No. S 322.10 DLA-LZ "Defense Manpower Data Center Data Base" published in 46 Fed. Reg. 40556 (10 Aug 1981).

(5) The starting date for the matching program is on or about June 1, 1982. The program will continue indefinitely unless registration under the Military Selective Service Act is termi-

nated by the President or Congress.

(6) The matching procedure for the program includes the following steps:

(a) The Social Security Administration will provide from its Master Files of Social Security Number Holders, the name, social security account number, and date of birth of each male born in the year of birth of the age selection group which should have registered during a particular calendar year. (Authority: Section 12 of the Military Selective

Service Act (50 U.S.C. App. 462), as amended by Section 916 of the Department of Defense Authorization Act, 1982; P.L. 97-86 approved 1 Dec 1981; and Presidential Proclamation 4771 of 2 Jul 1980, 45 Fed. Reg. 45247 (3 Jul 1980))

(b) The data received from the Social Security Administration will be compared to the Registrant Registration Records of the Selective Service System to eliminate from the Social Security list those

men who have registered. The names on the Social Security list that are not matched with the Selective Service list of registrants will constitute the Selective Service Suspected Violator Inventory System containing the names of suspected registration violators, pending further matching and confirmation.

(c) The Selective Service Suspected Violator Inventory System is then compared to the record systems of the Defense Logistics Agency and the

U.S. Coast Guard containing the names of personnel on active duty with the armed forces or exempt under 14 U.S.C. 711. The names of the persons who are exempt or on active duty with the armed forces are removed from the Suspected Violator Inventory System. (Authority: The Privacy Act of 1974; 5 U.S.C. 552a. (b)(7) and (e)(4)(D); and Presidential Proclamation 4771 of 2 Jul 1980, 45 Fed. Reg. 45247 (3 Jul 1980))

(d) The Selective Service Suspected Violator Inventory System is then matched by Internal Revenue Service to their Individual Master File to determine more current addresses of those persons in the Suspected Violator Inventory System. Internal Revenue Service then returns the Suspected Violator System computer tapes which include confirmed names and social security numbers, and current addresses. (Authority: Section 6103 of the Internal Revenue

Code; 26 U.S.C. 6103 (i) (2); and Presidential Proclamation 4771 of 2 Jul 1980, 45 Fed. Reg. 45247 (3 Jul 1980))

(e) All persons in the Selective Service Suspected Violator Inventory System are then contacted by the Selective Service System in an effort to effect compliance with the registration requirements of the law. Those who respond by registering are entered into the Selective Service Registrant Registration Records System and, if the total circum-

stances warrant, are removed from the Suspected Violator Inventory System. Those who fail to respond or refuse to register are reported to the Department of Justice for further investigation and possible prosecution. Those who respond but are determined to be exempt from registration pursuant to Section 6 of the Military Selective Service Act (50 U.S.C. App. 456) are removed from the Suspected Violator Inventory System.

(7) Disclosure of information from the various record systems acquired incident to the matching program will not be made to any non-federal agency.

(8) No new record system subject to the Privacy Act of 1974 is contemplated incident to the implementation and operation of the matching program.

(9) Alteration of the Selective Service Suspected Violator Inventory System (SVIS) - SSSS is contemplated to show the individual and agency sources of the data in the system. (The proposed amendment is included in Attachment A to this report.)

(10) Copies of this report are being sent concurrently to the Congress, addressed to the President of the Senate and the Speaker of the House.

SIGNED

/s/
Thomas K. Turnage
Director

HHS-OS-ECO
Jun 4 9 37 AM '82
Jun 4'82
D.C. Washington

The White House

Washington

3 June 1982

MEMORANDUM FOR THE HONORABLE RICHARD S. SCHWEIKER SECRETARY OF HEALTH AND HUMAN SERVICES

This memorandum will confirm our earlier telephone conversation in which I communicated to you the President's request, made pursuant to Section 12 of the Military Selective Service Act (50 U.S.C. App. 462, as amended by Section 916 of Pub. L. 97-86) ("the Act"), that you furnish to the Director of the Selective Service System, from records available to you as Secretary, the name, date of birth, social security account number, and address of individuals who are members of

any group of individuals required to present themselves for and submit to registration under Section 3 of the Act.

Thank you for your assistance.

FOR THE PRESIDENT:

/s/
EDWIN MEESE III
Counsellor to the President

Selective Service System
National Headquarters/
Washington, D.C. 20435

April 23, 1982

Mr. Richard Brown, Director
Office of Enumeration & Earnings Records
3-8-19 Operations Building
6401 Security Blvd
Baltimore, Maryland 21235

Dear Mr. Brown:

The purpose of this letter is to amplify on the agreement reached between the Director of Selective Service and the Commissioner of the Social Security Administration (see attachment 1), confirm discussions between our staffs and formally concur with specifications for the file extract you are preparing for us.

Selective Service needs to receive from you, pursuant to 50 U.S.C. App. 462(e), a computer tape containing the name, social security account number and

date of birth of all male holders of social security numbers who were born in 1960, 1961, 1962, 1963, and 1964. The record specification developed by our staffs is found as attachment 2 of this letter. As stated in attachment 1, our need date for the extract is June 1, 1982.

I understand from my discussion with Ms. Anita Moran of your staff, that there exists some question concerning the availability of the entire list of men born 1964. I have discussed the question with our General Counsel and have been told that there should be no legal reason for access to be restricted and, therefore, we are formally requesting data on those men.

The current effect of the Presidential proclamation is to require men born in

1964 to register in this calendar year. We are beginning a program which requires several months to perform and, with respect to persons born in 1964, will not be completed before the end of the year. Therefore, the compliance program is only aimed at individuals who are required to register. No individual will be contacted before the registration period provided to him by Presidential Proclamation 4771 has expired. These potential violators are exactly the persons at whom the new statutory language was aimed.

Thank you for your cooperation in this important program. If you have any questions about our data requirements, please contact me as soon as possible

so that all issues can be resolved in a timely fashion.

Sincerely,

/s/
Edward A. Frankle
Associate Director for
Policy Development and
Administrative Legal
Systems

Attachment 1

Selective Service System
National Headquarters/
Washington, D.C. 20435

March 31, 1982

MEMORANDUM FOR THE COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION

Subj: Program to Insure Compliance with Selective Service Registration

As we discussed in our telephone conversation of March 30, 1982, P. L. 97-86, December 1, 1982, amended the Military Selective Service Act (50 U.S.C. App. 462 et seq.) to allow the President to require provision to Selective Service of the name, date of birth, social security account number and address of individuals required to register with Selective Service. On March 26, 1982, this agency was given express authority to proceed with implementation of a registration

enforcement program based on a match of Selective Service and Social Security Administration files. The purpose of this memorandum is to confirm our discussion and to formally initiate such an enforcement program.

As we stated, our staffs have already met on several occasions and have outlined the specific tasks that need to be accomplished before you will be in a position to provide the necessary data. While none of these tasks are, of themselves, complex or lengthy, completion will depend upon establishment of a high departmental priority for the work. At Selective Service we have given the compliance program our highest priority and we feel that such an assignment is justified in light of the importance of

the program to national defense and the high level of attention given this program by Congress and the Military Manpower Task Force established by the President. I understand that you concur in that priority assessment and will do whatever is feasible to provide the necessary support in a timely fashion. Our current schedule is such that we will experience no program delay if we receive the necessary list from Social Security on or before June 1, 1982.

Finally, we discussed the financial cost of the work involved. I understand that you were requested, by representatives of the President, to provide support free of charge or in as economical a manner as possible. That request was a recognition of the fact that

Selective Service has received no additional funds to perform this program. Therefore, I understand you are examining ways to absorb as much of the cost for your vital services as is practicable.

Thank you again for any assistance you can provide. I appreciate your support for Selective Service projects in the past and I look forward to our maintenance of a close working relationship in the future.

/s/
Thomas K. Turnage
Director

Selective Service System
National Headquarters/
Washington, D.C. 20435

April 1, 1982

MEMORANDUM FOR THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE

Subj: Implementation of Military Selective Service Act Registration Compliance Program

Pursuant to Section 3 of the Military Selective Service Act (50 U.S.C. App. 453) and Presidential Proclamation 4771 of 2 July 1980, 45 Fed. Reg. 45247 (3 July 1980), male citizens of the United States and other males residing in the United States must register with the Selective Service System upon reaching the age of 18 years. The Selective Service System is responsible for administration of the registration process and for assurance of maximum compliance with the law. On March 26, 1982, this agency was given

express authority to proceed with implementation of a registration enforcement program based on a match of Selective Service, Social Security Administration, Internal Revenue Service and other federal files. The purpose of this memorandum is to formally initiate such an enforcement program and to request your assistance in assuring that the program is performed in the most expeditious, efficient and economical manner possible.

In accordance with direction from the Administration and the recommendation of the President's Military Manpower Task Force, we have developed a registration compliance program which is based upon computerized matching of individual records maintained by various federal agencies, including the Internal Revenue

Service. All details concerning participation of your organization were developed after consultation between my staff and your Disclosure and Security Division. A general description of the entire compliance program is found in a report we prepared for the Office of Management and Budget pursuant to the OMB matching guidelines dated 30 March 1979. A copy of our report is found as Attachment 1.

We need your assistance to proceed with the program in the manner outlined in the report to OMB. Specifically, after suspected violators have been identified by matching our files of men who have registered with the files of the Social Security Administration, we need to obtain the individuals' current addressees. I am requesting that we be provided the latest

addresses from your Individual Master File, under the authority of Title 26 U.S.C. 6103 (i)(2).

Our initial list of names for which we will need addresses, is estimated to be 170,000. I understand that we will be able to submit the names on magnetic tape through an existing IRS program, Project 719. This initial list will be ready for submission to your computer center in June 1982. Other smaller lists may be submitted throughout the year.

Finally, with respect to the priority and financial cost of the work involved, I understand that you have discussed with representatives of the President the importance of the program and the need to provide support free of charge. The financial aspect of that discussion is

very important since Selective Service has received no additional funds to perform this program. As a result, I understand you have agreed to absorb the cost for your vital services.

Thank you for your assistance and cooperation in this matter. I know that by working together our organizations can reach agreement on all remaining details in a timely manner and insure that this important program is a success.

/s/
Thomas K. Turnage
Director

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WD019
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FG251

The White House
Washington

February 25, 1982

MEMORANDUM FOR CRAIG FULLER

FROM: M. HODAPP *Not Legible

SUBJECT: Status of Draft Registration Prosecution Cases

As you know, the grace period for registration expires February 28. Prior to the announcement of the grace period, Selective Service referred suspected-violator cases to DOJ for processing. A series of warning letters were issued; and if the suspected violator still failed to register, the case was referred to the U.S. Attorneys Office.

After February 28th, Selective Service will refer cases directly to the U.S. Attorneys Offices. Because the decision to prosecute will be made on a case-by-case basis, DOJ expiects there will be a 6-8 week lag before they actually begin prosecuting.

DOJ anticipates that the actual number of non-registrants will be substantially lower than the 800,000 figure used recently -- because of the warning letters issued and the reality (vs. treat) of prosecution after the 28th.

• Not Legible
TR
PD
WD019
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PR016

• DRAFT REGISTRATION PROSECUTIONS
Not Legible

NOTE: 225 names of people (more names to follow) who failed to register have been sent to Justice for prosecution and the legal process has been started. First trials are expected the first week of July. Anti-draft groups promise protest demonstrations.

- About 93-94 percent have registered; confident most will without legal action.
- Always a small group of non-registrants -- usually 1 or 2 percent of eligible. Overwhelming majority

voluntarily comply.

- Prosecution not selective. After non-registrants are identified, their status verified (by FBI), and given a final chance to register -- then and only then are names submitted to U.S. attorney for prosecution. Especially important to recognize that no one is being prosecuted until given full counseling and opportunity to register.
- Don't have a draft, but registration is law of the land. It will be enforced.

Selective Service System
National Headquarters/
Washington, D.C. 20435

July 20, 1981

Mr. Lawrence Lippe, Chief
General Litigation and
Legal Advice Section
Criminal Division
Department of Justice
Box 887
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Lippe:

In accordance with our previous discussions, Selective Service hereby refers, for investigation and possible prosecution, the names of 134 individuals who may be in violation of the registration provisions of the Military Selective Service Act (50 USC. App. 451 et seq).

The names of all of the individuals being referred came to our attention by way of direct or indirect citizen contacts with this agency. Whenever the inform-

ation received was sufficient to permit correspondence, a certified, return receipt requested, letter was sent to the individual requesting verification of his status. Such a letter was sent in 103 of the 134 cases. These cases can be readily identified since the file folder label for each is green in color. The file folders for the 31 individuals who were not sent letters have orange labels.

The 103 individuals who were sent letters have been divided into four main categories for your convenience. Category I consists of 16 individuals who responded to our letter with a specific refusal to register. Category II contains 45 individuals who received the letter but did not reply. Category III represents 37 individuals whose letters were not delivered and

were returned to Selective Service.

Finally, Category IV contains five persons whose letters were not returned and for which return receipts were not received.

We are most anxious to provide you with whatever additional information or assistance you may need in the processing of these cases. I will be the contact point in Selective Service for any inquiries or requests relating to these referrals. My telephone number is 724-0844.

Sincerely,

/s/
Edward A. Franklo
Associate Director,
Policy Development and
Administrative Legal
Systems

President Carter
The White House
Washington, D.C. 20500 August 4, 1980

Dear Mr. Carter:

I am writing you about a decision I wish I had never been forced to make. It was perhaps the most important decision of my life,one which will most likely influence all my future actions. That was the decision to consciously and wilfully break a law of my country.

I love my country. I believe that its Constitution is close to perfect, its laws the most just in the world. That is why it pains me deeply when a law is enacted which contradicts the basic tenets of freedom and democracy upon which my country was founded. You enacted such a law when you signed the draft registration bill.

By signing the bill, you told me to make myself available for a system which I consider murderous and immoral. You wanted to make me part of your national defense, a defense which can only provoke a world-devastating war. And you applied the threat of imprisonment to coerce me into it.

I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consoquences which may befall me.

This was a big decision to make. You forced about four million other young men to make the same choice, and I know that a vast number of them chose the route of

noncooperation and resistance, as I did. I will now spend a large part of my time leading others to that route until your draft registration law is repealled. Please don't ask me to turn against my country any longer.

Sincerely,

/s/
David Wayte (born 12/19/60)
Student, Yale University

Temporary Address: 219 Walnut Ave., Santa Cruz, Ca 95060
(408) 426-4551

Permanent Address: 475 Alpine St. Pasadena, Ca 91106
(213) 795-0774

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 82-830
Plaintiff,	)	AFFIDAVIT OF EDWARD A. FRANKLE, SPECIAL ASSISTANT TO THE DIRECTOR OF SELECTIVE SERVICE FOR COMPLIANCE
v.	)	
DAVID ALAN WAYTE,	)	
Defendant.	)	

I, Edward A. Frankle being first duly sworn, do hereby depose and say:

1. I have been employed at the Selective Service System since May of 1980 until September 18, 1982. During that time I have had various duties both in my current position as Special Assistant to the Director for Compliance and in my prior position as associate Director, for Policy Development and Administrative Legal Systems. At all times however, I

have been responsible for the development and implementation of the program to ensure compliance with the registration requirements of the Military Selective Service Act.

2. Soon after the initiation of the registration program on July of 1980, Selective Service began to receive letters and telephone calls from individuals who claimed to be non-registrants or from individuals claiming to identify possible non-registrants. As soon as those letters were received, it became obvious that it was necessary to create a system to process this information in an orderly fashion. Thus, in late summer and early fall 1980, I was tasked by the Director of Selective Service with the responsibility to create and implement a system for

ensuring compliance of individuals whose names came to our attention.

3. Since any system involving compliance would require us to retrieve information about the individuals involved, it was necessary, prior to initiation of any enforcement action, to establish a system of records under the Privacy Act of 1974. This system of records had to describe the information to be maintained by Selective Service and the procedures which would be used with respect to that information. As a result, on January 21, 1981 Selective Service published a notice of a proposed system of records in the Federal Register. This system of records was called the Suspected Violator Inventory System (SVIS) and was intended to provide the framework in which

enforcement action could be begun against the individuals whose names who had come to our attention. During the comment period which was called for by the publication in the Federal Register, Selective Service received additional comments which indicated the advisability of making the system of records mor specific with respect to the handling that the records would receive. Therefore on May 14, 1981, a revised system of records was published in the Federal Register. This system, which became effective on June 15, 1981, supported the passive compliance program which resulted in the indictment of Mr. Wayte.

4. The passive compliance system is so named because Selective Service has done nothing in these cases to attempt to

determine the identities of people who have not registered. Instead, the names and or other identifying information have come to the attention of Selective Service from outside of the agency. In other words, Selective Service is passively receiving this information as opposed to actively searching out violators. The individuals who are in the passive compliance program were reported to us by various means. A reasonable number, probably slightly less than half, wrote letters or called Selective Service or another government agency expressing their determination not to register with the draft even though they were required to register under the applicable law. The remainder of the letters or telephone calls came to us from individuals who

reported persons whom they believed were in violation of the registration requirement, In cases where letters were not mailed directly to Selective Service, the other agencies which received those letters would forward them to Selective Service. Once received within Selective Service, all letters relating to compliance were forwarded to my office for necessary action.

5. It was as part of this system that the name of David Wayte came to my attention. Early in the registration period, in August of 1980, Selective Service received a letter from Mr. Wayte. In course, that letter was referred to my office. I remember receiving that specific letter simply because it was one of the first letters that we received. A

copy of the letter is attached as Exhibit A to this affidavit. Another letter was received from Mr. Wayte in February, 1981. A copy of that letter is attached as Exhibit B to this affidavit.

6. When the letter from Mr. Wayte was treated as were all other letters received on the same topic, and it was placed inside a standard file folder in a file cabinet in my office. All of the letters received were placed in that file folder and there was no differentiation made concerning how the letter was received, whether it came directly to Selective Service or from another agency, or whether the information contained was obtained from a letter or a telephone conversation.

7. After a period of several months, when it became clear that our system of records under the Privacy Act would soon be established, I reviewed all of the letters that were in the file folder in my file cabinet. By this time, I believe there were somewhat in excess of 250 individuals identified in that file. The first thing that I did was to read over each letter to determine whether the letter or telephonic tip received contained enough information to justify further processing. This review eliminated a significant number of individuals. The individuals eliminated from the file were those about whom insufficient information was received to believe that a possible violation occurred. As example, there were several letters, the exact

number of which I do not recall, which referred the names of women to Selective Service as non-registrants. In addition, there were several letters written by individuals who declared their opposition to the decision to resume registration but which did not indicate that the individual opposed to registration was of the age required to register. In some instances these letters also indicated that the persons involved were, in fact, too old or too young to actually be covered by the registration requirement. After the review I removed from the file and discarded all correspondence or notes relating to any individual who did not appear to be males within the year groups required to register. After that activity had been completed I took the file folder

to our Public Affairs Office and had them review the names and check them against a microfilm file containing registration information. That review determined that some of the individuals who either turned themselves in or were turned in by others were registered with Selective Service. At that time I removed from the file any documents related to registered individuals.

8. At the time of this review, the information concerning these individuals in the non-registrant file was still not indexed or maintained in such a way that information was retrievable. Once our system of records became final on June 15, 1981 and we could legally initiate our records system relating to possible violators, the file folder containing all of

the documents relating to possible non-registrants was removed from my file cabinet and the names of all individuals still remaining in that file were entered into our Suspected Violator Inventory System. Thus, for the first time, in mid-June 1981, a list was made up which contained the name, address and any other available identifying information concerning persons identified to us as being non-registrants. This list was entered into our word processing equipment in such a manner tnat all individuals in the file appeared alphabetically by last name. Appearing on that list was Mr. David Wayte. In arriving on that list he had been treated in an identical manner with all other persons also appearing.

9. Once the list was entered in the word processing equipment, the documents that had been contained, up until that time, in one undifferentiated file were placed in individual files by name. Therefore, each individual had his own file folder. That file folder also was kept in a file cabinet in my office. In the beginning, that file folder contained only the individual's name on a label and the incoming document wich caused Selective Service to initiate action toward enforcement of the Military Selective Service Act. Mr. Wayte's letter was placed in a file folder in the same manner as every other individual in the larger file. In Mr. Wayte's case the only document that would have been in the new file would have been his letter to the

Selective Service System. About that same time, I received a copy of an article about Mr. Wayte printed in San Jose Mercury News on July 20, 1980. I do not recall the source of the copy. In any event, I placed the copy in Mr. Wayte's file with his letter of August, 1980.

10. While my secretary was entering the names and addresses into the SVIS and creating individual file folders, I drafted a letter which would be sent to all identified individuals. This letter was meant to inform each individual whose name had come to our attention of two things: (1) that we had information that they should have registered but had not and (2) the specifics of the penalty for not registering. It also provided a form whereby registration by mail could be

accomplished, and allowed an explanation of the reason for non-registration to be supplied. In addition each persor was sent a postage-paid return envelope to Selective Service. Another check of our registration files was performed and, for all those not found on our file, a letter was sent on June 17, 1981 to each individual with an address in the Suspected Violator Inventory System. The letters were all sent certified mail and, except for names and addresses all letters and enclosures were identical. A copy of the text of the letter sent appears as Exhibit C to this affidavit. Although we do not have a record of exactly the number of letters that were sent on June 17, I believe the number was approximately 170. There also were some 31 individuals whose

names were turned in to Selective Service but for whom adequate addresses were not provided. Therefore, those individuals were not sent letters since there was no mailing address available.

11. At the time of mailing of the letter, the SVIS was modified by the addition of one additional bit of information; the date on which the individual was sent our letter. This information and the suspected violator inventory system have been maintained until today so that it is now possible to refer to the SVIS and determine the date upon which each person in that system was sent our letter.

12. At the same time that the letters were sent, the receipts for each piece of certified mail, PS Form 3800, were assembled in receipt number order and main-

tained near the files. These receipts showed that a piece of certified mail was sent to a person at a certain address and are stamped by the postal service with the date of mailing. The receipt for the mail to Mr. Wayte shows that he was sent a letter at 475 Alpine Street, Pasadena, California on June 17, 1981. These receipts were kept in numerical order, in the same file drawer as were the files of the individuals. When the green certified mail receipts that are signed by the addressees wer received at Selective Service they were sent to my office and, based on the certified mail number that is written on that card, the appropriate receipt was removed from the package and the two documents were then put into the individual's file folder. Thus, the mail certifi-

cations sent to Mr. Wayte were placed in his folder. Examination shows a signature in the name of Marcia Wayte on the receipt (PS Form 3811). Copies of the mail certifications appear as Exhibit D to this affidavit.

13. The letter sent by Selective Service to the identified individuals invites a response. In many cases individuals did indeed write back to Selective Service. When such a letter was received it would be filed in that individual's file folder along with other documents that have previously been described. After approximately a month, all of the files were reviewed to determine the reply status for each individual. There were several types of responses. Many people in response to our letter registered.

Others claimed and produced proof of one sort or another that they were not required to register since they were not of the proper age or were female. Some wrote back and admitted they were required to register but that they would not. Still others apparently received the letters (based upon the signed receipt) but did not respond at all. Finally, others had their letters returned as undeliverable. We developed a series of status codes which related to these varying types of responses. A list of those codes appears as exhibit F to this affidavit. Once my assistant or I determined the status of each, that status was entered into the SVIS. Therefore, by reviewing the suspected violator inventory system records which are kept, I note that

Mr. Wayte's initial status code is code 2. This means that the letter to him was delivered, but he failed to respond to that letter in any way.

14. After all of the status review had been completed and the suspected violator inventory system was updated with the status codes, a review was made through our word processing equipment and all individuals who were registered or were not required to register were eliminated from the system (status codes 6, 7, 8). Once eliminated, we kept no further records of those individuals so exact numbers of those cases are not available. After one final check of our registration file we referred to the Department of Justice all individuals in status codes 1 through 5. Since the letter to Mr. Wayte

had been delivered and he failed to respond in any way, he was in status code 2 and was thereby referred with the remainder of the group. Once referred, an additional code, code 10 was added to his entry in the suspected violator inventory system.

15. After the review and necessary modifications to the SVIS had taken place, there were remaining 134 names. Of the approximately 170 letters that had been sent, 103 were still on the list. For an additional 31 individuals, an insufficient address was possessed by Selective Service so no letter had been sent. After discussion with the Department of Justice, these names were also forwarded over to the Department of Justice for investigation and possible prosecution. There-

fore, when Selective Service referred to the Department of Justice 134 individuals on July 20, 1981 those 134 consisted of 103 who had been sent a letter by Selective Service and 31 who had not. Of the 103, 16 had written to Selective Service and specifically reaffirmed their refusal to register in response to our letter. Forty-five individuals received the letter as shown by the signed certified mail receipts but did not reply. Thirty-seven letters were returned to Selective Service undelivered and five of the letters had an unknown delivery status meaning Selective Service received back neither the letter nor the delivery receipt. In any event all 134 cases that had been processed by Selective Service were referred to the Department of Justice

at one time.

16. The actual referral was accomplished by me personally carrying the file folders of the 134 cases to the Department of Justice in a cardboard box. At that time I delivered the documents as well as an explanation of the delivery status of the various letters to officials from the General Litigation and Legal Advice Section of the Criminal Division of the Department of Justice and the FBI. I believe that at that meeting for the Department of Justice were Mr. James Reynolds and Mr. David Kline. I turned the folders over directly to Mr. Kline at that meeting. One of the folders, in group 2 of our referrals was the folder of Mr. David Wayte. A copy of the letter actually referring the cases to the

Department of Justice is attached as Exhibit F to this affidavit.

17. A review of the treatment provided to Mr. Wayte's file as opposed to the files of any other individual in that referral group shows that Mr. Wayte received no special attention and that treatment of his file cannot be distinguished from any others. The contents of each file were the same with respect to having one document which indicated how the name came to the attention of Selective Service, a certified mail receipt, a copy of the letter sent to the individual by Selective Service and a copy of any repy received from the individual. If the individual's letter was not delivered, the undelivered letter appeared also in the file. Mr. Wayte's case was

not given any special attention by Selective Service and he was not specially investigated or individually discussed or specially handled by Selective Service System. Outside of the statements he made in the two letters to Selective Service in August, 1980 and February, 1981, Selective Service had at the time of his referral no knowledge whatsoever of any activities of Mr. Wayte and indeed we still are unaware of any outside activities other than those that have been reported in newspaper articles. Therefore, he was not referred for possible prosecution because of any anti-draft or political activities. He was referred simply because he offered his name to the attention of Selective Service and upon investigation by letter, it became

apparent that he most probably was in violation of the Military Selective Service Act.

18. Since the passive compliance system was initiated in mid-1981, it has proceeded in an almost identical fashion with that described above. On October 21, 1981 Selective Service referred 49 additional individuals to the Department of Justice and on May 14, 1982, 103 additional individuals were referred. In each of these cases letters or telephone calls were received and placed into a joint file until a sufficient quantity was assembled to justify mailing a new batch of certified letters. The same checks of registration status were done on the individuals as was done on the initial batch containing Mr. Wayte. Individuals who

remained on the list after our mailing were referred to the Department of Justice. Thus the system designed and implemented to process these individuals has proceeded since its inception in a virtually uninterrupted and unchanging manner. The only changes that have occured to date have been that there has been some reassignment of the steps surrounding mailing and physical checking of registration files within Selective Service. However, prior to referral the same steps are accomplished and in the same order as were done in the first batch containing Mr. Wayte's name.

19. The passive program which has been described exculsively up to this point was initiated at the time that it was because that was the only system for

which Selective Service had authority and or resources. We are now beginning the implementation of an active program of enforcement wherein Selective Service will attempt to identify and locate individuals who have not registered but who should have. That program, whose initiation has been delayed by legal action concerning the use of the social security number, by legislative action granting Selective Service authority to obtain information from the Social Security Administration, and by the requirements of the Privacy Act itself, will be formally initiated during the month of August 1982. We anticipate that once this program is fully operable by late 1982 or early 1983 it should be able to locate the vast majority of non-registrants in the country. This system

was not initiated sooner solely because of lack of time, authority and resources.

/s/
Edward A. Frankle,
Assistant to the
Director
Selective Service
System

SUBSCRIBED AND SWORN to be
me this 23 day of Septemter, 1982

/s/
Notary Public in and
for said County and
State

• Notary Seal

HHS-OS-ECO
Jun 4 9 37 AM'82
Jun 4'82
D.C. Washington

The White House

Washington

3 June 1982

MEMORANDUM FOR THE HONORABLE RICHARD S. SCHWEIKER SECRETARY OF HEALTH AND HUMAN SERVICES

This memorandum will confirm our earlier telephone conversation in which I communicated to you the President's request, made pursuant to Section 12 of the Military Selective Service Act (50 U.S.C. App. 462, as amended by Section 916 of Pub. L. 97-86) ("the Act"), that you furnish to the Director of the Selective Service System, from records available to you as Secretary, the name, date of birth, social security account number, and address of individuals who are members of

any group of individuals required to present themselves for and submit to registration under Section 3 of the Act.

Thank you for your assistance.

FOR THE PRESIDENT:

/s/
EDWIN MEESE III
Counselor to the President

MEMORANDUM

Subject	Date
Prosecutive Policy in Selective Service Non-Registrant Cases	Mar 23, 1982 LL: LJK:maa

To D. Lowell Jensen
Assistant Attorney General
Criminal Division

From Lawrence Lippe,
Chief General Litigation and Legal Advice Section
Criminal Division

You requested our views on prosecutive policy now that the grace period for registering with Selective Service has expired. This is an interim memorandum since we do not know (1) the particulars of Selective Service's active system for identifying non-registrants and (2) the incidence of compliance once the Service has identified non-registrants pursuant to the active program. Until we have some better perspective on the Service's active

program and the incidence of compliance with that program, we think it is too early to craft an ultimate prosecutive policy for large numbers of non-registrant referrals.

I. INFORMATION ABOUT COMPLIANCE PROGRAM

On March 10, 1982, the Military Manpower Task Force endorsed the Service's plan to use social security rolls to identify non-registrants.

Edward A. Frankle, Esquire, Selective Service's Associate Director for Policy Development and Administrative Legal Systems, is endeavoring to create an active program which will enable him to refer identities of non-registrants to the Department of Justice by early October 1982. Social Security, however, has

suggested that it may not be able to complete the identification of males of appropriate age until late summer. Unless Social Security is able to speed its identification, the Service's first referrals of non-registrants identified by computer match can not occur until early 1983. 1/

1/ Selective Service is counting on strong White House support to hasten Social Security's providing assistance.

With such information we are able to suggest a response to two issues facing us: (1) What should we do with the referrals we have already received? (2) What should we tell Selective Service when it wants to make more referrals before fully implementing an active identification program?

II. OUTSTANDING MATTERS

Selective Service has referred 183 matters to us since the beginning of registration. These were people who either reported themselves as not having registered or who were reported by others. A number of Mennonites, who historically have been reluctant to comply with Selective Service requirements, and others with religious or moral objections are represented in the "self-reported"

referrals. Those who were referred by others are liable to be vocal proponents of non-registration. Thus the initial prosecutions resulting from the Selective Service "passive" enforcement program are liable to appeal least to a prosecutor.

Moreover, the present scheme is liable to result in numerous selective prosecution claims. Since the Service's passive identification system necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly result in allegations that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights.

A way to avoid these problems is to hold prosecution of the "passive identification" non-registrants until the Service is able to identify non-registrants by an active system. Assuming that the "active identification" non-registrant class is so large that prosecution of everyone is impracticable, we could apply the same selection standard to the "passive" referrals as to the "active" referrals. Not only would we avoid some of the "passive" legal problems, we could probably even avoid some of the "passive" prosecutions. Nevertheless, we cannot recommend putting the "passives" on hold until the "actives" are referred. We are precluded from doing so by one factor -- time. If the Department of Justice waits until late this year to institute prose-

cutions of non-registrants, the registration scheme will suffer greatly. Consequently, we reluctantly conclude that United States Attorneys should be directed to proceed to prosecution with the matters which have already been referred to them. 2/ We attach a message to United States Attorneys containing such a direction if you agree.

2/ We see no reason to change your August 17, 1981, policy memorandum to all United Attorneys.

Kline

✓ Filed
___ Entered
___ Lodged
___ Received
Aug 19 1982
Clerk, U.S. District Court Southern District of California
By Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Cr. Case No. 82-0504-GT
Plaintiff,	ORDER
v.	
BENJAMIN H. SASWAY,	
Defendant.	

This case came on for hearing on defendant Benjamin Sasway's motion to dismiss the indictment on the ground of selective prosecution. A full evidentiary hearing was conducted on August 17 and 18,

at which time the Government presented the testimony of Selective Service's Edward A. Frankle, Special Assistant to the Director for Compliance; David J. Kline, Senior Legal Advisor, General Litigation and Legal Advice Section, Criminal Division, United States Department of Justice; Peter K. Nunez, United States Attorney for the Southern District of California, San Diego; Douglas G. Hendricks, Chief, Criminal Complaints Section, U.S. Attorney's Office, San Diego, California; Robert D. Rose, Chief, Criminal Division, U.S. Attorney's Office, San Diego; and Claude Shelby Durr, Special Agent, Federal Bureau of Investigation, San Diego Di-

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vision. The court orally announced its decision to deny defendant Sasway's motion to dismiss the indictment on the

ground of selective prosecution and articulated the reasons for its decision.

In order to sustain an allegation of discriminatory or selective prosecution, a defendant must show: 1) that others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted; and 2) that his selection was based on impermissible grounds such as race, religion, or his exercise of his First Amendment right to free speech. United States v. Wilson, 639 F.2d 500, 503 (9th Cir. 1981); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976).

The court finds that defendant Sasway was not individually singled out for prosecution as a result of his exercise of

his First Amendment right to free speech. The court finds further that the passive enforcement system does not in itself result in the selective prosecution of vocal resisters. Under the passive enforcement system, individuals other than vocal resisters are subject to prosecution. The court finds that the Government is not singling out vocal protesters for prosecution but is prosecuting and would prosecute any nonregistrants that come to its attention either by self-reporting or by third party reports.

An analogy to the present case is provided by the tax protester cases. In such cases, with my thousands of potential investigations and only limited enforcement resources, only a very small number can be prosecuted. As the Ninth Circuit

noted in Wilson: "It is also not surprising that tax protesters, who seek by various attention-getting devices to attract enforcement attention to their cases, succeed . . . . Unless one can show that the tax laws are deployed against protesters in retaliation for the exercise of their rights, a selective prosecution argument will fail." 630 F.2d at 505.

Unlike the situation presented in United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), the court finds no evidence that the Selective Service laws have been deployed against vocal protesters in retaliation for the exercise of their First Amendment rights. The court finds that this prosecution is in no way based upon the Government's singling out defendant Sasway, either individually

or as a member of a class of vocal protesters, for reasons such as his race, religion, or in order to deter him from exercising his consitutional rights. The court also finds that the Department of Justice chose neither defendant Sasway nor the Southern District of California for the first indictment.

After consideration of the motion and memoranda of points and authorities, the exhibits, the evidence, the questions raised and argument, for the reasons set forth orally at the hearing, and for the reasons set forth above, the court hereby denies the motion to dismiss the indictment on the ground of selective prosecution.

IT IS SO ORDERED.

Dated:

August 19, 1982

/s/
GORDON THOMPSON, Jr.,
Judge United States
District Court

Copies to:

Charles T. Bumer, Esq.
1168 Union, Suite 400
San Diego, Ca 92101

Yesnin Saide-Annen, Esq.
Asst. U.S. Attorney

Selective Service System
National Headquarters/
Washington, D.C. 20435

Affidavit

of

Thomas K. Turnage

I, Thomas K. Turnage, being duly sworn state that

1. I am the Director of Selective Service and have served in the capacity since October 30, 1981.

2. The identification and processing of possible violators of the Military Selective Service Act for referral to the Department of Justice is the responsibility for this work. I have no knowledge of the details of such activity.

3. I first learned of the existence of Mr. David Wayte when reports of his

indictment appeared in the news media.

/s/
Thomas K. Turnage

Subscribed and sworn to before me this 1st day of October, 1982.

Notary Public

* Notary Seal

STEPHEN S. TROTT
United States Attorney
ALEXANDER H. WILLIAMS III
Chief Assistant U.S. Attorney
RICHARD R. ROMERO
Assistant U.S. Attorney
1400 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: 213-688-6527

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	)	CRIMINAL CASE NO. 82-630
Plaintiff,	)	DECLARATION OF DEPARTMENT OF JUSTICE ATTORNEY DAVID J. KLINE CONCERNING SELECTIVE SERVICE SYSTEM REFERRALS
V.	)	
DAVID ALAN WAYTE	)	
Defendant.	)	

I, DAVID J. KLINE, declare as follows:

1. I have previously created an affidavit and declarations which have been filed in this case, and I have testified

in a hearing in this case.

2. In response to a Court order, my office searched my records in order to determine how many alleged Selective Service nonregistrants, who were referred to the Department of Justice, reported themselves and how many were reported by others. I testified at a hearing on October 7, 1982, to those statistics which were given to me over the telephone.

3. I have been informed that the Court has order that a declaration be filed concerning the statistics on self-reported and other-reported alleged non-registrants. In addition, I understand that the Court has ordered that the declaration include statistics on self-reported and other-reported alleged non-registrants among those who have been

indicted.

4. I personally searched my files in order to create this declaration. My files are current for information received by my office by on or about September 28, 1982. In addition, I know of two indictments returned subsequent to that date.

5. Since my secretary at the time did not make copies of the original 105 referrals to United States Attorneys in September of 1981, I do not have copies of the material referred from Selective Service in July of that year. When a subsequently created Federal Bureau of Investigation report existed in such files, I looked at the report to see if it gave me sufficient information to make a reasoned judgment about whether the subject reported himself or whether he was

reported by others.

6. I counted as "self-reported" those files which indicated that a person affirmatively sought to bring his alleged violation to the attention of the Government. I counted as "other-reported" those files which indicated that a third-party brought the alleged violation to the attention of the Government or when the person, apparently in response to an inquiry, told someone like an Immigration and Naturalization Service agent or a Federal Bureau of Investigation agent that he had not registered, and the agent then brought the matter to the attention to the Department of Justice or Selective Service.

7. There were a few files in which there simply existed a handwritten note

concerning a name and address and perhaps a little more information. I assumed that these were notations resulting from calls to Selective Service, most probably anonymous, and counted these matters as "other-reporteds."

8. When my files were insufficient to create appropriate information for cases in which indictments have been returned, I contacted the Headquarters of the Federal Bureau of Investigation. I requested that Special Agent James Carey search the files to determine whether his office still had the originally referred information. Fortunately, Mr. Carey was able to obtain the files and inform me concerning the origin of the information concerning alleged nonregistration in instances in which my files concerning

indictments were deficient.

9. The results of my search and calculations are reflected in the attached charts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 1982.

/s/
DAVID J. KLINE

PROSECUTIONS (INDICTMENTS RETURNED)

TOTAL: 13

Self-reported: 12 1/
Others-reported: 1

1/ Includes the three cases in which the defendants have been convicted.

ACTIVE MATTERS (EXCLUDING CASES IN WHICH INDICTMENTS HAVE BEEN RETURNED

TOTAL: 144

Self-reported:	68
Others-reported:	54
Unknown:	22

MATTERS REFERRED TO INS (REQUESTED INFORMATION CONCERNING WHETHER PERSON WHO APPEARED TO BE AN ILLEGAL ALIEN WAS IN THE UNITED STATES AND, IF SO, WHAT HIS PRESENT ADDRESS WAS)

TOTAL: 34

Self-reported: 0
Others-reported: 34

MATTERS UNDER STUDY BY DEPARTMENT OF JUSTICE PRIOR TO REFERRAL TO UNITED STATES ATTORNEY AND FEDERAL BUREAU OF INVESTIGATION

TOTAL: 1

Self-reported: 1
Others-reported: 0

CLOSED MATTERS

Persons Who Registered

TOTAL: 97

Self-reported:	10
Others-reported:	52
Unknown:	35

Persons Who Are Not Within The Registrant Class (Too old, Women)

TOTAL: 37

Self-reported:		27
too old:	16	
women:	11	
Others-reported:		4
too old:	4	
Unknown:		6

Unable to Locate or Fictitious

TOTAL: 10

Self-reported:	5 2/
Others-reported:	4
Unknown:	1

2/ Includes two matters for which there was insufficient information to begin investigation.

Enlisted in Armed Forces

TOTAL: 3

Self-reported:	0
Others-reported:	0
Unknown:	3

TOTAL	
SELF-REPORTED:	123 3/
OTHERS-REPORTED:	149 4/
UNKNOWN:	67 5/

TOTAL REFERRALS TO DEPARTMENT OF JUSTICE: 339 6/

3/ Includes 27 people not within the registrant class who reported themselves.

4/ Includes 4 people not within the registrant class who were reported by others.

5/ Includes 6 people not within the registrant class.

6/ Selective Service twice referred two seperate individuals. Its records show 341 referrals.

STEPHEN S. TROTT
United States Attorney
RICHARD R. ROMERO
Assistant U.S. Attorney
312 North Spring Street
Los Angeles, California 92189
Telephone: 213-688-6527

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. DAVID ALAN WAYTE Defendant.	)	Criminal Case No. 82-630 AFFIDAVIT OF DEPARTMENT OF JUSTICE ATTORNEY DAVID J. KLINE

DISTRICT OF COLUMBIA) ss.

I, DAVID J. KLINE, being first duly sworn, do hereby depose and say:

1. I am employed by the General Litigation and Legal Advice Section of the

Criminal Division in the United States Department of Justice as the Senior Legal Advisor for Crimes Against Government Operations, a position I have held since February 1980. I have been employed by the Department since August 4, 1974.

2. In my position as Senior Legal Advisor, I am responsible for rendering advice on, and otherwise administering and supervising the administration of, numerous federal statutes which prohibit crimes generally falling within the category of crimes against government operations. These statutes include, among others, the statutes prohibiting threats against, assaults on, or murder of the President; counterfeiting; forgery; assaults on Federal officers; wiretapping; theft on government property; postal

depredations; etc. I am a first level supervisor of attorneys within the General Litigation and Legal Advice Section when these attorneys perform legal advice functions within my assigned area. I engage in litigation, including litigation of immigration cases. I draft legislation as needed and otherwise fulfill the function of senior attorney for the General Litigation and Legal Advice Section of the Criminal Division.

3. On or about July 18, 1980, James S. Reynolds, the section's Principal Deputy Chief, informed me that the statute penalizing the fa-lure to register with the Selective Service System (50 U.S.C. App. 462) was added to the statutes already within my assigned area. Three days later, on July 21, 1980, registration with the Selective Service System began

pursuant to Presidential Proclamation 4771.

4. Several times in the following months, I communicated with Edward A. Frankle, then the Selective Service's Associate Director for Policy Development and Administrative Legal Systems, so I could ensure that the Department of Justice was prepared when the Service was ready to refer matters to us for investigation.

5. On May 26, 1981, in a meeting with Selective Service representatives Edward Frankle and Henry Williams, who is General Counsel, I learned that the Service intended to refer 75 to 100 alleged non-registrant matters to the Department of Justice in mid-June for investigation and possible prosecution.

6. On June 25, 1981, the Supreme Court, in the case of Rostker v. Goldberg, upheld the registration scheme against a sex-discrimination challenge.

7. I began the process of drafting a memorandum concerning prosecution policy in Selective Service non-registration cases. The policy, as revised, was signed by the Assistant Attorney General on August 17, 1981. It is attached to this affidavit as Attachment A.

8. On July 20, 1981, the Selective Service System referred the names of 132 possible non-registrants to the Department of Justice. The referrals consisted of 132 files contained in an open cardboard box. They were carried into my building by Edward A. Frankle, then an Associate Director of the Selective Service System.

As I recall, the only other person from the Department of Justice who was present at the meeting was Special John McNabb from the Federal Bureau of Investigation.

9. Several days later, Mr. Frankle referred to me two more files which had been inadvertently omitted from the box containing the initial referrals.

10. The referrals were files of possible non-registrants that the Service learned "passively," that is, persons who were brought to the Service's attention. Those who found their way into the Service's passive enforcement program got there two ways: (1) they reported themselves or (2) others reported them. In instances in which the Service had an adequate address, it sent the alleged non-registrant a letter and a registration

form. In the event that the alleged non-registrant continued to refuse to register, the Service referred the matter to us. It also referred matters involving non-registrants when it had no sufficient address.

11. I reviewed the files to determine as best I could whether the persons were within the class of persons who should have registered. I also examined the files to determine what problems might exist if the Department referred the matters for investigation and prosecution.

12. As a result of my examination, I decided to refer 105 of the files to the Federal Bureau of Investigation and appropriate United States Attorneys' offices. One such file concerned Mr. David Wayte. Of the remaining twenty-nine

names, twenty-four were referred to the Selective Service System by the immigration and Naturalization Service's Galveston Border Patrol Office. When I contacted the responsible Border Patrol officer, he informed me that the persons referred were generally aliens and that they were probably no longer within the United States. Consequently, I referred these names to the INS and requested that it tell us whether the aliens were still within the United States, and, if so, what their present addresses are. Of the remaining five names, two were of persons who registered subsequent to the Selective Service referral to us, and one person was discovered not to be within the class of persons who must register. The remaining two files referred by Selective Service

contained letters from alleged non-registrants, but no return addresses and no envelopes. Consequently, those files contained insufficient information to begin investigations.

13. I had a Department of Justice librarian go through the 105 files and determine the appropriate United States Attorneys' offices to send them to.

14. I prepared a form transmittal letter to United States Attorneys, finished an "essential elements" memorandum prepared primarily by another attorney, and obtained other appropriate material. I had my secretary photocopy the files and send the photocopies along with the transmittal letters and enclosures to the United States Attorneys identified by the Department of Justice

librarian.

15. On August 24, 1981, I hand-carried to Federal Bureau of Investigation Special Agent John McNabb the 105 original files referred by the Selective Service System.

16. On October 21, 1981, the Service referred 49 more files to me. I handled these in substantially the same manner as the initial 134 referrals. After reviewing them to see if the persons were probably within the class of individuals who had to register but who failed to do so, I had the files reviewed by a Department of Justice librarian to determine which United States Attorneys' offices they should be sent to. On November 18, 1981, I hand-carried 46 of the files to Special Agent John McNabb of the Federal

Bureau of Investigation. Of the remaining files, two appeared to involve illegal aliens who might no longer live within the United States, and one person registered prior to the Service's referring his file to me. I recollect that the Service informed me that another person had registered and that I had my secretary so inform the Federal Bureau of Investigation. Consequently, I had my secretary send 45 files with cover letters and enclosures to the appropriate United States Attorneys' offices. Of the two apparent illegal aliens, one apparently registered during the grace period (see below), and I referred the other to the Immigration and Naturalization Service for a determination (1) whether he is still in the United States and (2) if so, what his

present address is.

17. On or about December 9, 1981, the Department of Justice directed United States Attorneys to seek no indictments in non-registrant matters until the Department issued further directions.

18. On January 7, 1982, the President announced the continuation of Selective Service registration and declared a grace period for persons who registered late.

19. On January 20, 1982, Selective Service, after consultation with the Department of Justice, declared that the grace period would extend through February 28, 1982.

20. On May 14, 1982, Selective Service informed us of those who registered from among its 183 original

referrals. After reviewing my records, I identified which matters still remained active, that is, the persons whom our records showed still might be within the class of people who are required to register but who had failed to do so. There were seventy. On June 8, 1982, the Department sent letters, referring again those who had not registered during the grace period, to United States Attorneys in whose districts the matters remained active. 1/ Since Mr. Wayte whose one of those who did not register, he was refer-

---

1/ The only exceptions were the result of inadvertent omissions. There were three such matters. Upon my discovering the omissions, I immediately caused letters to be sent. There may have been a few other matters which, because of either erroneous information in the file or mistaken handling, were sent after June 8, 1982.

red again to the United States Attorney in the Central District of California as a possible violator of 50 U.S.C. App. 462.

21. Also on May 14, 1982, the Service referred 103 more names of possible non-registrants to the Department of Justice. I handled these matters in substantially the same manner as the Summer and Fall, 1981, matters were handled when they were initially referred to me.

22. On June 15, 1982, the Department of Justice sent a teletype message, which I prepared, to all United States Attorneys. In the message, the Assistant Attorney General for the Criminal Division said that the Department was concerned that "any significant delay in instituting prosecutions will impact adversely on the

registration scheme and result in an increase in numbers of persons who refuse to register." He requested that the matters be handled on a priority basis.

23. My best recollection is that in early July of 1982, I spoke with Assistant U.S. Attorney Richard Romero, and he informed me that his office would seek an indictment of Mr. David Wayte later that month.

24. Neither I, nor to my knowledge, anyone in the Department of Justice in Washington, D.C., provided the matter involving Mr. Wayte with any special treatment. Neither I, nor to my knowledge, anyone in the Department of Justice in Washington, D.C., chose the matter involving Mr. Wayte as one of the first to be presented for indictment.

Indeed, I specifically avoided attempting to influence either the order in which persons would be indicted or the districts in which such indictments would occur.

25. At the time of my referring the file to the Federal Bureau of Investigation and the United States Attorney for the Central District of California, I knew no more about Mr. Wayte than was contained in the material referred by the Selective Service System.

26. I referred the file concerning Mr. Wayte to the Federal Bureau of Investigation and the United States Attorney for the Central District of California for no reason other than that it appeared that he had violated federal law by

failing to register with the Selective Service System.

/s/
DAVID J. KLINE

Sworn to and subscribed
before me this 21st day
of September, 1982.

/s/
NOTARY PUBLIC

My Commission Expires
March 14, 1985

DECLARATION OF IRA HERSHKOWITZ

My name is Ira Hershkowitz. I am a third year student at the UCLA School of Law. I have personal knowledge of the following, and if called upon, could testify thereto.

I spent portions of approximately one and a half days ascertaining where the lists containing the name, date of birth, and address of states' licensed drivers are obtainable. I phoned officials in several states. I found that:

(1) Upon supplying fifteen reels of magnetic tape, and paying $320, the State of Iowa would supply a list of the names, dates of birth, and addresses of all the licensed drivers in the State of Iowa;

(2) Upon payment of $1,000, Texas would supply lists of names, dates of birth, and addresses of 5,000 licensed drivers in the State of Texas. Additional names would be

supplied at three cents per name on magnetic tape, or at five cents per name on paper. Further, Texas would limit the lists to a particular age (i.e. eighteen year olds) or age group (i.e. 17-19 year olds) at no extra cost. So, for example, $2,000 would purchase a paper list containing the name, date of birth, and address of 25,000 18-year-old Texans.

(3) Upon supplying a statement of intended uses, a signed agreement not to use the lists for illegal purposes, i.e. deceptive advertising, and a $10,000 bond to assure performance for the agreesent, the State of Michigan would supply lists containing the name, date of birth, and address of licensed drivers in the State of Michigan. The lists would cost $16 per thousand licensed drivers. Further, Michigan would limit the lists to as particular age or age group at the cost of $64 per thousand. So, for example, I

could purchase a list of the names, dates of birth, and addresses of 1,000 18-year-old Micigan residents for $64.

However, the State of Michigan would supply the same lists to the U.S. Government at the state's cost. So, the U.S. Government could obtain a list of the names, dates of birth, and addresses of all 18-year-old licensed drivers, and/or all licensed drivers in the State of Michigan for $500. Where the federal government and not a private citizen requets the lists, Michigan waives the non-illegal use agreement, and the $10,000 bond requirements. All that is required from the U.S. Government in addition to the $500 is the statement that the lists would be used for U.S. Governmental purposes: (4) The State of Colorado would supply lists of the names, addresses, and dates of birth of licensed drivers in the State of Colorado. Upon supplying magnetic tape to the State

of Colorado, this could be obtained for $15 per thousand licensed drivers. If no tape is supplied by the customer, Colorado would provide paper lists at a cost of $25 per thousand licensed drivers. Further, Colorado would limit the lists ot the 16-18 year old age group or the 18-21 year old age group at no extra cost. So, for example, $1,000 would purchase a paper list of the names, dates of birth, and addresses of 40,000 16-18 year old Colorado licensed drivers.

I am presently awaiting return telephone calls from officials in other states where I made inquiry regarding similar lists to those just described.

This declaration was executed on September 27, 1982 at Los Angeles, California.

/s/
IRA HERSHKOWITZ

JUL 31 1981

Honorable Mark Hatfield
Chairman, Senate Appropriations Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the Administration's position on the need for legislation providing the Selective Service System with the explicit authority to require registrants to provide Social Security numbers and allowing a match of Social Security and Selective Service records and access to current address information from the Internal Revenue Service.

Under the Privacy Act of 1974, the Selective Service System is not now entitled to require registrants to provide their Social Security numbers.

Proponents of this legislation believe it to be the most efficient and effective way

of conducting an active program to assure compliance with the requirement for young men to register with the Selective Service System.

Based upon our experience with the 1980 National Registration, the magnitude of teh compliance problem is small. we estimate that over 95% of the eligible population has registered. That registration was accompanied by extensive publicity.

The 1981 National Registration conducted over a 2 week period in january achieved 87% compliance.

Since moving to continuing registration, our experience is not as favorable (we currently project that 69% of eligible persons are registering). We believe this to be primarily a failure to adequately publicize the requirement to register rather than a

failure to comply. Accordingly, we believe an increase in efforts to ensure that all eligible young men become aware of their obligation to register is preferable to a aggressive compliance program.

For this reason, we do not believe that legislation permitting the Selective Service System to require the Social Security number is needed.

Sincerely,

DAVID A. STOCKMAN

David A. Stockman
Director

IX.

LETTERS FROM/TO DAVID WAYTE

Selective Service Systems
600 E Street NW
Washington, D.C. 20435

February 1, 1981

Dear Selective Service System,

Last August I wrote to inform you of my intention not to register for the draft. Well, I did not register, ant still plan never to do so, but thus far I have received no reply to my letter, much less any news about your much-threatened prosecutions.

I must interpret your silence as meaning that you are too busy or disorganised to respond to letters or keep track of us draft-age youth. So I will keep you posted of my whereabouts.

For the forseeable future I will be traveling the nation by foot, encouraging resistance and spreading the word about peace and disarmament. I will tell people that if we hope to live in a peacefull world, then we must

take the first step right here at home by achieving social justice and by discontinuing a dangerous and antagonistic military posture.

You can reach me by sending all correspondence to my home address of 475 Alpine St. Pasadena, CA 91106

Sincerly,

/s/
David Wayte

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President Carter
The White House
Washington, D.C. 20500

August 4, 1980

Dear Mr. Carter:

I am writing you about a decision I wish I had never been forced to make. It was perhaps the most important decision of my life, one which will most likely influence all my future actions. That was the decision to consciously and willfully break a law of my country.

I love my country. I believe that its Constitution is close to perfect, its laws the most just in the world. That is why it pains me deeply when a law is enacted which contradicts the basic tenets of freedom and democracy upon which my country was founded. You enacted such a law when you signed the draft registration bill.

By signing the bill, you told me to make myself available for a system which I consider murderous and immoral. You wanted to make me part of your national defense, a defense which can only provoke a world-devastating war. And you applied the threat of imprisonment to coerce me into it.

I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for you your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me.

This was a big decision to make. You forced about four million other young men to make the same choice, and I know that a vast number of them chose the route noncooperation and resistance, as I did. I will now spend a large part of my time leading others to

that route until you draft registration law is repealed.

Please dont ask me to turn against my country any longer.

Sincerely.

/s/
David Wayte (born 12/19/60)
Student, Yale University

Temporary Address: 219 Walnut Ave.,
Santa Cruz, CA 95060
(408) 426-6351

Permanent Address: 475 Alpine St.
Pasadena, CA 91106
(213) 795-0774

Selective Service System
600 E. Street NW
Washington, D.C. 20435

August 4, 1980

Dear Selective Service System:

I have not registered for the draft. I plan never to register. I realize the possible consequenses of my action, and I accept them.

I promise myself not to cooperate with you in any way which will aid the United States military. I promise you the I will be honest and straightforward about my position.

I address you as a system, not as individuals.

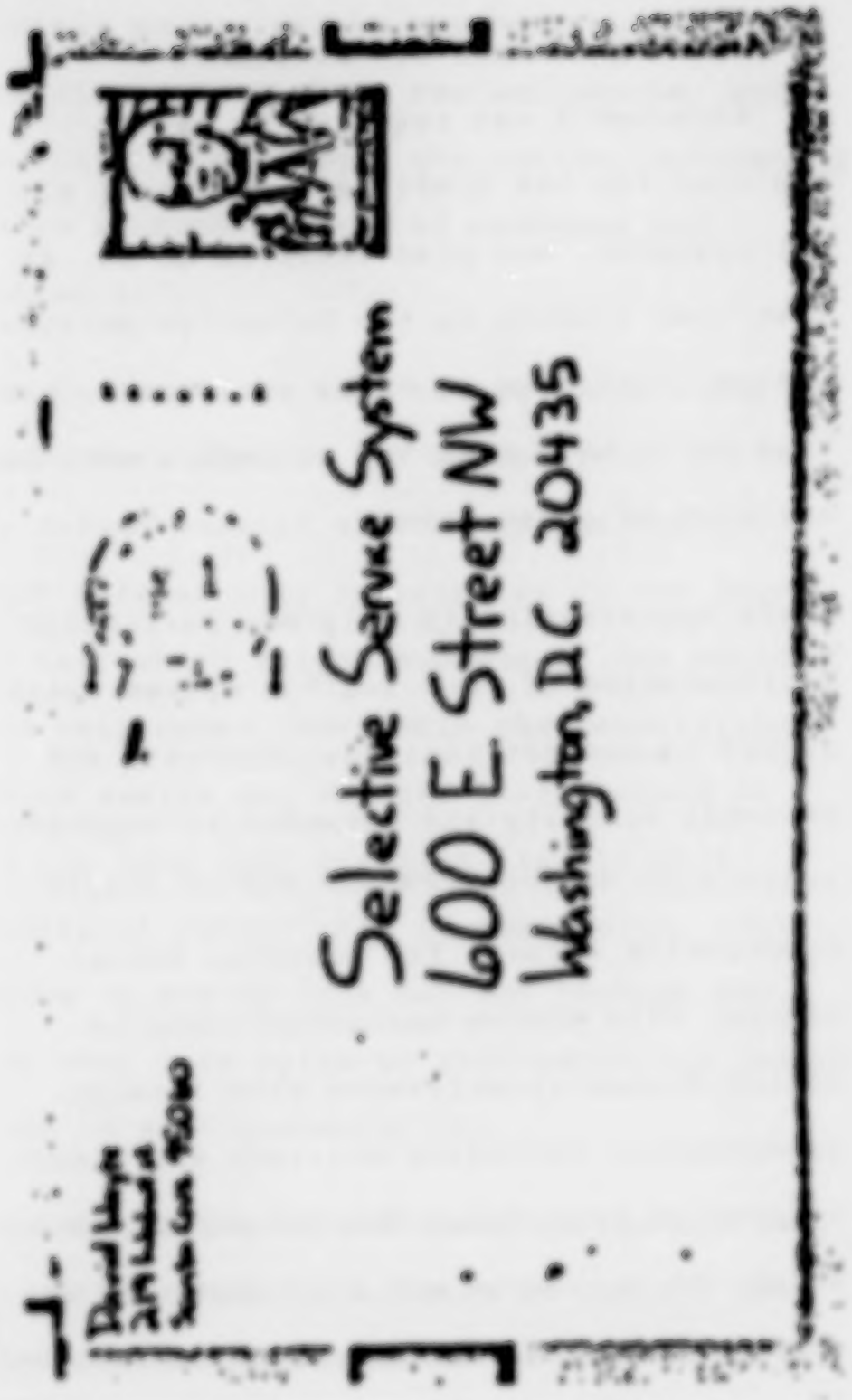
I wish you didn't exist.

Sincerely,

/s/
David Wayte (born 12/19/60)
Student, Yale University

Temporary Address: 219 Walnut Ave.
Santa Cruz, CA 95060
(408) 426-4551

Permanent Address: 475 Alpine St.
Pasadena, CA 91106
(213) 795-0774



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Statement of Resistance

Although I was required by law to register for the draft last summer, I did not register, and plan never to do so. At that time I wrote to the Selective Service System, informing it of my resistance, but thus far I have received no reply, much less any hint of prosecution.

Draft registration is only one particular manifestation of "not legible system established to protect business interests and national security and intended to suppress individual self-expression and to stifle cooperative efforts for peaceful social change. This system has connections to United States interference with foreign governments, including military and financial support of repressive Third World dictatorships, to poisonous and self-destructive energy interests such as synthetic fuel and

nuclear power, and to the continuation of the diseases, such as racism, sexism, and poverty, which plague our nation, condemning it to a chronic state of weakness and instability.

The nuclear arms rase taking place today makes more obvious the absurdity of trying to defend oneself militarily against war. Such defense only contributes to the power of fear which reigns supreme in our world and only makes inevitable the devastation which awaits us. We must learn before it is too late that strength lies in self-restraint rather than in aggression, that peace is won by love but not through war, and that life exits in self-sacrifice rather than in self-preservation.

Discriminating on the basis of age and sex, draft registration singles us out for participation in a mechanism of war. It makes

us available to kill another person because of his nationality, and places us on the front lines as warriors and puppets of greed. On the other hand, registration also provides us an opportunity to say "no", to voice our opposition to a system of oppression, and to commit ourselves to the cause of peace.

Governments use the tool of fear to round up thier potentical draftees. By threat of a felony conviction and possible imprisonment, pressured by our families and concered about our own careers, we are coerced at a vulnerable age to sign ur names and our lives over to the military. This coersion, in turn, perpetuates the deep, internal cycle of cynicism and impotence which erodes the character of our generation and numbs us to the violence and injustice done both to ourselves and to others throughout the world.

we must put an end to this cycle of fear and act, for once, out of strength rather than intimidation. The temptation to compromise one's principles by choosing the easiest and most pragmatic route is very strong in this society. By registering despite our own conscience and will, thinking that we can escape induction through legal conscientious objector status, medical deferments, or by resisting at a later stage when the draft itself is enacted, we only squelch the voice of dissent within ourselves and delay as well as complicate our inevitable choice between war and peace.

The draft affects us all. Don't register.

David Wayte

Temporary Address: 90 Austin st.
New Haven, Ct 0515
(203) 389-9773

Permanent Address: 475 Alpine st.
Pasadena, CA 91106
(213) 795-0774

United States Attorney
Central District of California

United States Courthouse
312 North Spring Street
Los Angeles, California 90012

ASO:RLB:RRR:cj
(213) 688-2423

REGISTERED

RETURN RECEIPT REQUESTED

October 15, 1981

Mr. David Wayte
475 Alpine Street
Pasadena, California 91106

Re: Registration for Selective Service

Dear Mr. Wayte:

We have been advised that you are required to register with the Selective Service under the provisions of the Military Selective Service Act, and that you have not yet registered. If a person is convicted of violating this Act, he may be imprisoned for five years or fined $10,000, or both.

You should note that your case has been referred to the Federal Bureau of Investigation and to the Office of the United States Attorney for the Central District of California.

Regarding registration, I am enclosing a special registration form prepared by the Selective Service. Fill out the form and mail it in the enclosed envelope to the Selective Service System. If you fail to register within three weeks, your case will be considered for prosecution.

Sincerely,
ANDREA SHERIDAN ORDIN
United States Attorney

/s/
RICHARD R. ROMERO
Assistant United States Attorney
Deputy Chief, Criminal Complaints Section

Enclosures

cc: Lawrence Lippe, Chief
Generai Litigation and
Legal Advise Section
U.S. Department of Justice
Post Office Box 887,
Ben Franklin Station
Washington, D.C. 20044

X.

GOVERNMENT FILE ON DAVID WAYTE

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 7/2/82

DAVID ALAN WAYTE, 475 Alpine, Pasadena, California, (213) 795-0774, was advised of the interviewing agent's identities and of the nature of the interview. WAYTE was interviewed in the presence of his attorney, WILLIAM G. SMITH, 1911 Wilshire Boulevard, (213) 413-4430. WAYTE advised as follows:

WAYTE advised that he is currently employed by the Los Angeles Times, 717 West Woodbury, Altadena, California. WAYTE's supervisor is BERNIE HOOK.

WAYTE viewed photocopies of letters dated August 4, 1980, and February 1, 1981, addressed to the Selective Service System, 900 E Street, NW, Washington, D.C. and signed by DAVID WAYTE. Attached to the letter dated August 4,1980, was a photocopy envelope bearing a postmark with an illegible date

addressed to the Selective Service System and bearing a return address of 219 Walnut Street, Santa Cruz, California 95060. Attached to the letter dated February 1, 1981, was a photocopy of an envelope postmarked February 28, 1981, Pasadena, California, addressed to the Selective Service System and bearing a return address of 474 Alpine Street, Pasadena, California 91106. After viewing both letters and envelops, WAYTE advised that he authored both letters, addressed the envelopes and caused the letters to be delivered to the Selective Service System.

A photocopy of a newspaper article appearing in the San Jose Mercury News, Sunday, July 20, 1980, edition, written by MICHAEL COLLIER, and entitled "Non-Cooperation is his Way", was displayed to WAYTE by the interviewing agents. The article had a picture of a white male identified as

DAVID WAYTE. The article concerned WAYTE's refusal to register for the draft with the Selective Service System. WAYTE stated that he was the subject of the article and the article accurately reflected his interview with COLLIER. WAYTE stated that the only comments attributed to him in the article that were not completely accurate were, "Prison can be a rewarding experience, a time for reflection", and that his fater, "...denounces me for what I'm doing". WAYTE advised that the comment regarding prison was only a part of statement he had made concerning the possibility of going to prison and he stated that his father does not denounce his actions.

WAYTE viewed a 2 page form letter from Selective Service System which explains the requirements of registering under provision of the Military Selective Service Act, as well as possible penalties for failing to

register as required by law. WAYTE stated that he recalls receiving a letter, similar to the one displayed, in August, 1981. He advised that he had read the letter but was advised by Attorney SMITH not to answer whether or not he understood the letter. WAYTE, however, had previously stated that he had graduated from high school, attended one year of college at Yale University, and could read, write, and understand the English language.

WAYTE viewed a letter from Assistant United States Attorney (AUSA) RICHARD R. ROMERO, Los Angeles, dated October 15, 1981, addressed to DAVID WAYTE, 475 Alpine Street Pasadena. WAYTE stated that he received the letter which had been delivered by registered mail.

WAYTE was asked to initial the above referenced letters and newspaper article, but upon the advice of his attorney, refused.

WAYTE further refused to answer questions regarding knowledge of his duty to register with the Seletive Service System and his willfull refusal to register. WAYTE refused to divulge his date and place of birth upon the advice of his attorney.

WAYTE is discribed as:

Sex	Male
Race	White
Height	6'1"
Weight	130 pounds
Eyes	Blue
Hair	Blond, shoulder length
Facial hair	Beard
Address	475 Alpine Street, Pasadena, California
Date of birth	December 19, 1960
Place of birth	Arcadia, California
Father	ALAN PAUL WAYTE
Mother	BEVERLY WAYTE
Sister	MARCIA, age 17

Brother	LARRY WAYTE, age 19
Driver's license	California N7330635
Arrest record	States none
Medical ailments	States none

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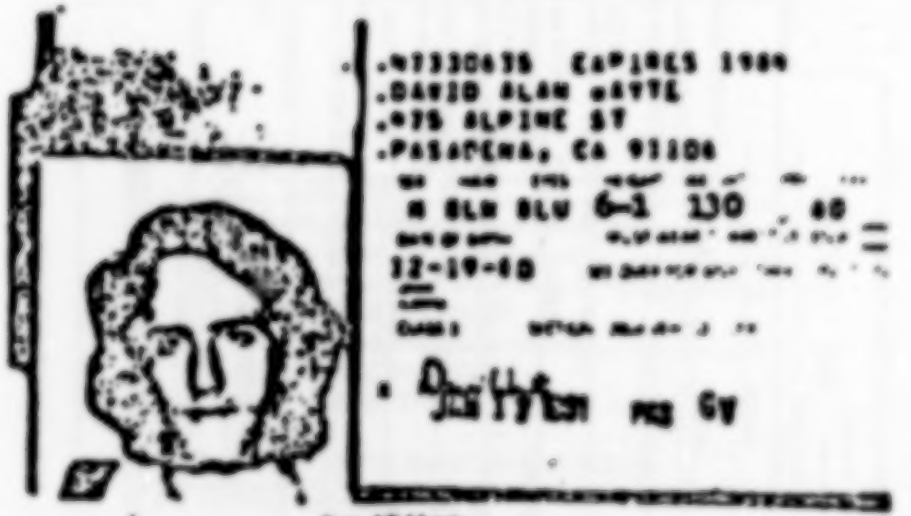
investigation 6/28/82 at Los Angeles,

California File Los Angeles 25-101195

SA WALTER K. IONA
by SA EDWARD B, ONCHOTORENA/EBO/ksl

Date dictated 6/29/82

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES
FOR DMV OR LAW ENFORCEMENT USE ONLY



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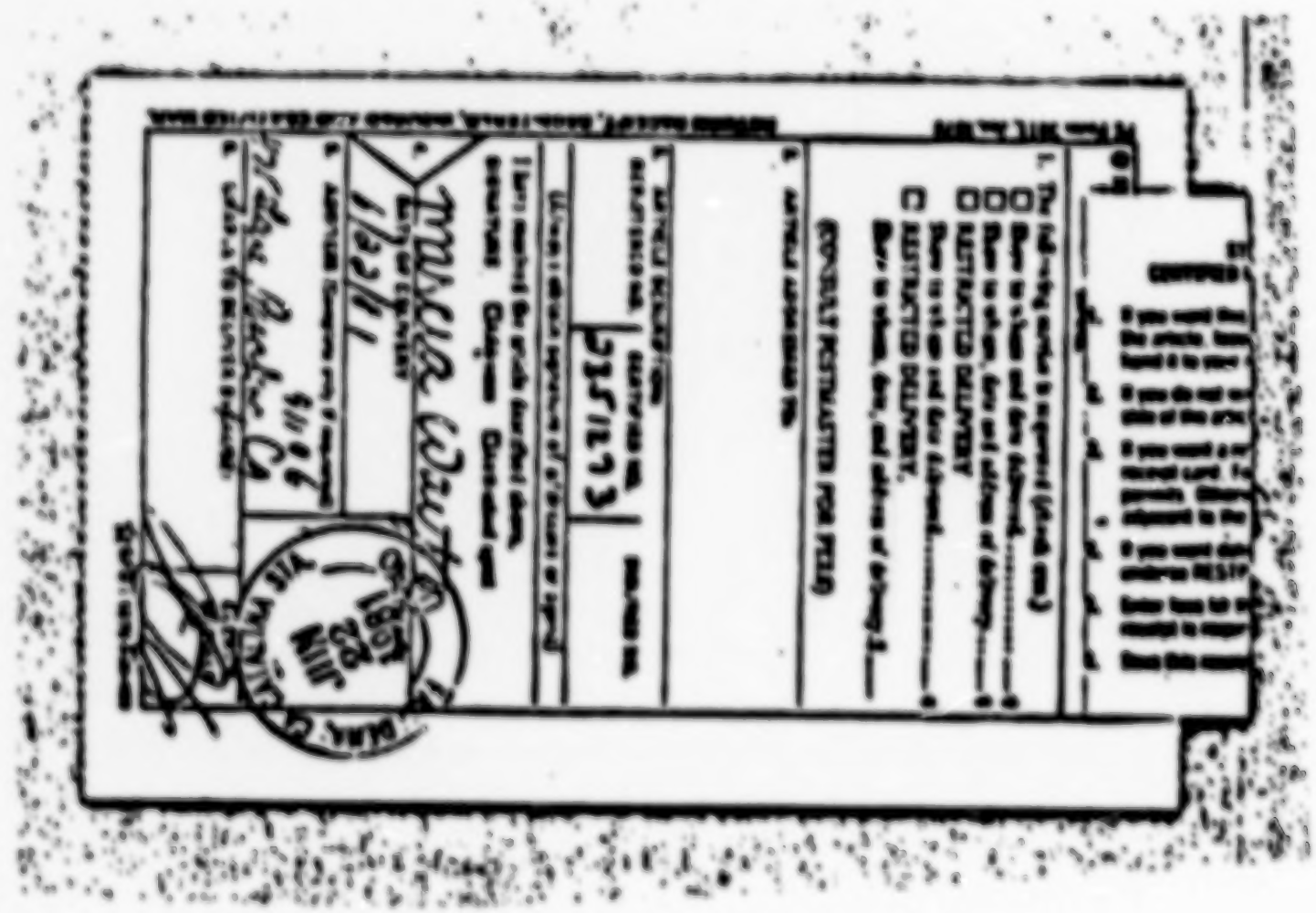
*seal omitted

CERTIFICATE OF LIVE BIRTH 1003

Filed JAN 20 1961 RAY E. LEE, COUNTY RECORDER



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XI.

SELECTIVE SERVICE

SAMPLE LETTER/FORM

Selective Service System
P.O. Box 350, North Chicago, IL 60064

Dear Sir:

The Internal Revenue Service has mailed this letter for the Selective Service System. Although the IRS has not given your address to the Selective Service System, it may be required to give the information in the future if you fail to register under the Military Selective Service Act.

Government records indicate that you were born in 1963 and have not registered. Federal Law requires you to register within 30 days of your 18th birthday if you are a male born after 1959 and if you are:

(1) a U.S. citizen or

(2) an alien living in the United States.

You are required to register EVEN IF YOU HAVE A PHYSICAL OR MENTAL DISABILITY OR MAY QUALIFY FOR DEFERMENT OR EXEMPTION FROM INDUCTION.

Fill in the spaces on the attached form which apply to you:

1. If you have not registered but are reqyured to fill, in Section A.
2. If you have registered, fill in Section A.
3. If you do not have to register, fill in Section B.
4. If the addressee is unable to complete the form and you are answering for him, fill in Section C.

THIS IS A VERY IMPORTANT MATTER. Failure to register is a serious federal offense. In order for us to remove your name from our list of possible non-registrants, YOU MUST COMPLETE AND RETURN THE ENCLOSED FORM WITH 15 DAYS of receipt.

Thank you for your cooperation and prompt reply.

Sincerely,

/s/
THOMAS H. TURNAGE
Director

Selective Service System
National Headquaters/Washington,D.C 20435

June , 1981

Dear Mr. :

We have received information that you you may be required to register with Selective Service under provision of the Military Selective Service Act, but a check of our records indicates that you have not registered. The purpose of this letter is to check the accuracy of this information. Please understand that we are required by law to refer possible violators of the Military Selective Service Act to the Department of Justice. If a person is convicted of violation of the Act he may be imprisoned for not more than five years or fined more than $10,000 or both.

Generally, a male who is not already in the active Armed Forces is required to

register with Selective Service if he was born in 1960, 1961 or 1962, or if born in 1963 or a later year, within 30 days of his eighteenth (18) birthday. If a person required to register fails to do so because of "some condition beyond his control" he must be able to prove that the "condition not under his control" prevented his from registering. If the "condition" changes he has 30 days to register. Generally, being in preson or confined in a hospital or institution qualifies as a "condition beyond his control."

In order for us to clear our records, and not forward your name to the Department of Justice for investigation by the Federal Bureau of Investigation you must take one of the following actions:

- If, as described above, you are required to register and have not already done so, please fill in the

enclosed form and mail it to Selective Service in the enclosed envelope.

- If, as described above, you are required to register but have not already done so because of a continuing "condition beyond your control", please indicate in a letter mailed in the enclosed envelope your reason for your continued non-registration.
- If, as described above, you are required to register and believe that you have registered, please send us a copy of your Registration Acknowledgement letter (SSS Form 3) or provide us your Selective Service number in the enclosed envelope.
- If, as described above, you do not believe you are required to register please explain why you feel you do

not have to register and provide proof of your status in the enclosed envelope. Proof will vary from case to case but may be a copy of your birth certificate, a DD Form 53 or similar form showing your actice duty status in the military, a statement, in English, from the diplomatic agency of the country of which you are a subject explaining why you are not required to register, or other document which supports your claim.

Please note that sending false information in response to this letter may be a violation of the Military Selective Service Act and may subject the sender to the penalties described above.

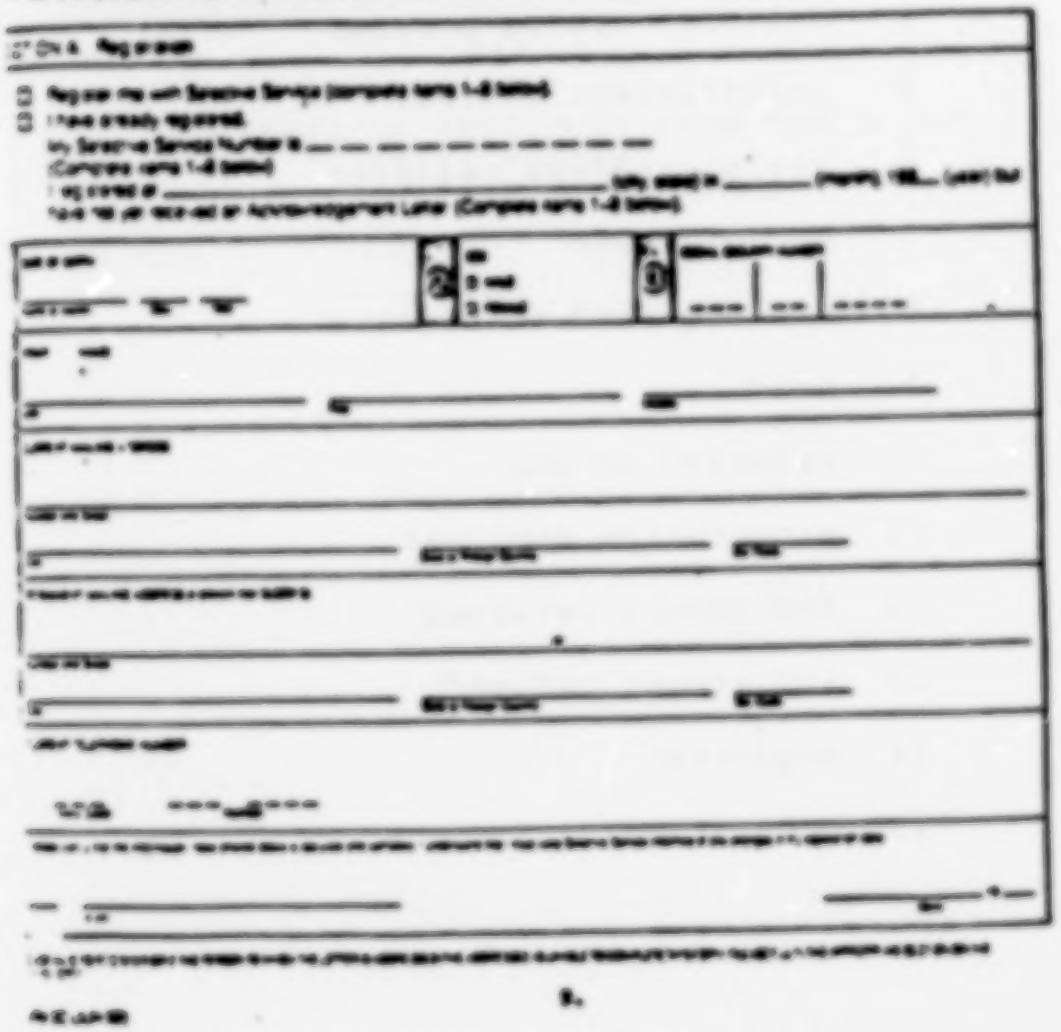
Let me stress that unless we hear from you within 15 days of the date of this letter we will send your name to the Department

of Justice for Investigation and possible prosecution. If you have registered or if you are a person who is not required to register we are sorry for any inconvenience this letter may cause you and we appreciate your help in clearing our record.

Sincerely,

Henry N. Williams
General Counsel

SEL_CTIVE SERVICE SYSTL.M



BEST AVAILABLE COPY

POSSIBLE NON-REGISTRANT FILES

Status Codes

1 sent letter, refused to register

2 sent letter, failed to reply

3 letter undelivered

4 delivery status unknown

5 insufficient address

6 registered/was register

7 our of range

8 not required to register

9 Lold

10 referred to DOJ

11 prosecution declined

12 indictment returned

13 indictment refused

14 acquittal

15 conviction

XII.

EXCERPTS OF TESTIMONY FROM THE TRIAL RECORD

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE TERRY J. HATTER, JR., JUDGE PRESIDING

UNITED STATES OF AMERICA, Plaintiff, v. DAVID ALAN WAYTE, Defendant.	)	No. CR 82-630-TJH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California

Date: Thursday, October 7, 1982

PATRICIA FERRIER
Official Reporter
410 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 628-8423

(Pg. 4, lines 1 - 18)

LOS ANGELES, CALIFORNIA, THURSDAY, OCTOBER 7, 1982, 9:50 A.M.

-0-

(Other Court matter.)

THE CLERK: Item number two, criminal action CR 82-630, U.S.A. versus David Wayte.

Counsel, please make your appearances.

MR. ROMERO: Good morning, your Honor. Richard Romero for the government.

THE COURT: Thank you, Mr. Romero.

MR. MARMARO: Good morning, your Honor, Richard Marmaro also for the government, your Honor.

THE COURT: And, Mr. Marmaro, you are in the office here, are you?

MR. MARMARO: Yes, your Honor. I am appearing with Mr. Romero in this case.

THE COURT: Thank you, Who else?

MR. ROMERO: And with me at counsel table are David Kline --

(Pg. 4, lines 19 - 25)

THE COURT: Yes, Mr. Kline.

MR. ROMERO: -- from the Department of Justice, and FBI Agent Edward Ochotorena.

MR. OCHOTORENA: Good morning, your Honor.

THE COURT: Good morning.

MR. SMITH: Your Honor, William Smith for David Wayte. Mr. Wayte is seated at the counsel table.

(Pg. 5, lines 1 - 4)

Colloquy

Also seated at the counsel table are Dan Stormer, Mr. Mark Rosenbaum -- and Mr. Terry Amdur is absent with the permission of the defendant.

• • •

(Pg. 16, lines 1 - 5)

Colloquy

Mr. Kline, would you come forward and be sworn, please.

Anyone else who expects to be a witness in this case, please step outside

(Pg. 16, lines 5 - 23)

until you are called. Please do not discuss the matter among yourselves. That is both for the government and for the defense.

DAVID J. KLINE

called as a witness on behalf of the plaintiff, having been duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: My name is David J. Kline, K-l-i-n-e.

THE CLERK: Is "J" the initial "J" or J-a-y?

THE WITNESS: Pardon me?

THE CLERK: Is the "J" the initial "J" or --

THE WITNESS: It's the initial "J".

THE CLERK: Thank you.

MR. ROMERO: Your Honor, first I would like to state that although there are a great number of documents I believe that the testimony will go rather quickly and it won't take much time.

THE COURT: Yes. Thank you.

DIRECT EXAMINATION

(Pg. 17, lines 1 - 19)

BY MR. ROMERO:

Q Mr. Kline, by whom are you employed?

A I am employed by the General Litigation and Legal Advice Section of the Criminal Division in the United States Department of Justice.

Q And how long have you been employed by the Department of Justice?

A I have been employed by the Department of Justice since August 4, 1974.

Q And what is your current job title?

A I am the Senior Legal Advisor for claims against government operations.

Q And, basically, what are your duties?

A I have been assigned a block of statutes, and it is my duty to render advice on, to otherwise administer and supervise the administering of these statutes by the United States Department of Justice.

Q And did there come a time when you

(Pg. 17, line 19 - pg. 18, line 13)

were assigned to Selective Service matters?

A Yes, there did.

Q When was that, approximately?

A That would have been on or about July 18, 1980. And that is when James S. Reynolds, who is the principal Deputy Chief of the Section, walked into my office and said, "This statute, too, is assigned to you."

Q And that occurred on July 18, 1980?

A On or about.

Q And relevant to that, when did the Presidential Proclamation 4771 issue with respect to the requirement of registration?

A My recollection is that it issued on July 4th, 1980. Strike that.

It wouldn't have been July 4th. It would have been July 2nd, 1980.

MR. ROMERO: I would like the Clerk to place Exhibits numbers 1 and 2 before the witness.

(Pg. 18, line 14 - pg. 19, line 6)

THE COURT: Surely.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q I ask you to identify Exhibit number 1.

A This is a document which I drafted for publication in the United States Attorney's bulletin. It has -- it's broken down essentially into two headings.

One is "Evolving Prosecutor Policy", and --

Colloquy

THE COURT: Just one minute, Mr. Kline. Mr. Rosenbaum?

MR. ROSENBAUM: Your Honor, could the government furnish the defense with a copy of whatever exhibits the witness is making reference to?

THE COURT: It is Exhibit 1 now. As I understand it, you have some copies, do you not, that have already been culled out so that the defense could have them subject to

(Pg. 19, lines 19 - 24)

a ruling of the Court as to any of the other matters that are deleted?

MR. ROMERO: Well, your Honor, all the materials that I am referring to now have been previously disclosed to defense counsel.

THE COURT: That is what I thought.

MR. ROSENBAUM: That is correct, but I didn't know --

THE COURT: Perhaps he could make some reference to them by date and some other identity to let you look through your papers and see if you can find them.

MR. ROSENBAUM: The difference --

MR. ROMERO: Your Honor, I wouldn't have any objection if defense counsel sat here close to me, and as I referred to each item just pull it out and show it to him, and I think --

THE COURT: There does not appear to be another copy as such. So that is a good suggestion. Thank you, Mr. Romero.

(Pg. 19, line 25 - pg. 20, line 17)

MR. ROSENBAUM: Thank you.

Kline - Direct by Mr. Romero

BY MR. ROMERO:

Q Please identify Exhibit 1.

A Exhibit 1 is an item that I drafted for the United States Attorney's bulletin.

The intent was to try to get out to the field, to the United States Attorneys' Offices, some kind of perspective of what was going on with Selective Service and inside the Department of Justice.

It is divided into two heads. The first is called "Evolving Prosecutor Policy".

We did not know, I did not know exactly what to expect from Selective Service at this time. Consequently, I wanted to notify the field that we didn't know; however, there are certain broad principles, certain broad perimeters which they, the United States Attorneys' Offices should start thinking at.

(Pg. 20, line 18 - pg. 21, line 12)

Q And what was that first primary goal?

A The first primary goal was that the object of any prosecutive policy must be to encourage and to facilitate administration with the Selective Service system.

Q Now, with respect to the second item involving counseling violations, could you briefly explain what that means?

A The Subsection 462A of Title 50 Appendix prohibits the number of crimes. One of those crimes that it prohibits is counseling others to fail or refuse registration with the Selective Service system.

Q Did you have a special concern with respect to such counseling violations?

A Yes, I did. Yes, we in the Department of Justice did.

Q What was that?

MR. ROSENBAUM: I am going to object and move to strike the portion of the answer "we

(Pg. 21, line 12 - pg. 22, line 7)

in the Department of Justice did".

THE COURT: Yes. That will be stricken.

Just tell us about your involvement. Go ahead.

BY MR. ROMERO:

Q What was your concern?

A My concerns, of course, were that we would be very careful not to infringe on First Amendment rights.

Counseling would seem or would appear on examination of the statute, on its face, to involve speech, telling others to do something or not to do something.

In order to be as careful as we could not to infring upon First Amendment rights I wanted, and the Department of Justice directed in the document that I drafted, that all counseling violations must be cleared through us, with my telephone number here on this document.

Q And with respect to Exhibit number

(Pg. 22, line 7 - pg. 23, line 1)

2, will you please identify that and describe the significance of that document.

MR. ROSENBAUM: I am going to object.

THE COURT: Yes?

MR. ROSENBAUM: Let's take one at a time. First, letting him describe it, it's a compound question. And with respect to having him explain the significance, again, I don't -- There is no foundation that this letter -- The only person who can talk about the significance is Mr. Heyman, the individual who signed the letter.

THE COURT: Well, not necessarily. Let's find out. I think your objection was preliminarily made. It's precipitous.

It is overruled.

Go ahead.

BY MR. ROMERO:

Q Please identify that item?

A This is a memorandum that I drafted per the signature of Mr. Heyman, the Assistant

(Pg. 23, lin3 1 - pg. 23, line 20)

Attorney General to the Attorney General.

It was sent from the criminal division September 22, 1980. And the essence of it is to lay out the -- some of the obvious background, that there is registration with the Selective Service system, to let him know where we are, and that is the Selective Service is not ready to refer matters to us, to get in the broad -- get into him the broad policy guidance that we have given to United States Attorneys, primarily, of course, again, being that any goal of a prosecutive policy has to be to encourage registration with the Selective Service System.

I then spoke about a meeting that I then had scheduled with the Selective Service system representatives. And the purpose of the meeting, of course, was to learn the Service's plan so we in the Department of Justice could be prepared when there were to be alleged non-registrants

(Pg. 23, line 20 - pg. 24, line 15)

referred over to us.

And I said, finally, of course, that I see the criminal division's primary roles to be developing policy and giving guidance to United States Attorneys' Offices.

Q And what was your role in formulating that policy and guidance?

A I am for the Department of Justice the operational person, almost -- and I do believe the overwhelming majority of policy memoranda and directives to United States Attorneys' Offices have been drafted by me.

I do hasten to add, though, and I must add that, of course, these memoranda, these letters, these directives have, of course, been reviewed by superiors.

Q When you make contact with Selective Service--when you made contact with Selective Service was there any particular person who was your contact?

A At that time I had another attorney

(Pg. 24, line 15 - pg. 25, line 10)

working with me. I directed that attorney to go into Selective Service -- into the Selective Service system and come out with someone with whom I could establish a liaison in order to have the information that I needed to prepare the Department of Justice.

The person who was dug out of Selective Service was Edward A. Frankle.

Q And did you thereafter meet and consult with Mr. Frankle.

A I dealt with Mr. Frankle several times on the telephone, once again, requesting that I be informed what was going to happen ahead of time so I could prepare the Department of Justice.

And, yes, I did meet with him numerous times also.

Q Just approximately, when do you think the initial contact was?

A The memorandum that I have just referred to Exhibit 2, indicates that at that

(Pg. 25, line 10 - pg. 26, line 4)

time I had scheduled the meeting.

The meeting would have occurred subsequent to that memorandum, which probably placed it late September, 1980.

MR. ROMERO: I would ask the Clerk to place Exhibits 3, 4 and 5 before the witness.

THE COURT: Very well.

MR. ROMERO: And 6.

THE COURT: Very well.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q I ask you to identify Exhibit number 3.

A Exhibit 3 is a memorandum which I drafted for the initials or signature of D. Lwell Jensen, the Assistant Attorney General in charge of criminal division, to Rudolph Juliani, the Associate Attorney General.

It was sent from criminal division June 4th, 1981.

(Pg. 26, lines 5 - 21)

Q And what was the purpose of this memorandum?

MR. ROSENBAUM: Excuse me, your Honor. I want to object to questions on the issue of foundation.

I am just concerned about where this is going. I don't mind a question saying, "What was your intent to preparing a memorandum", but I don't think this witness has established that he can indicate either Mr. Juliani's intent or Mr. Jensen's intent with respect to the memorandum itself.

THE COURT: All right. That is sustained.

Why don't you rephrase the question and ask him the intent of his draft.

BY MR. ROMERO:

Q What was your intent in drafting this?

A Oh. Okay. As indicated in the first footnote, I had met on May 26th, 1981 with Ed Frankle, who was then the Associate

(Pg. 26, line 21 - pg. 27, line 13

Director for policy development and administrative legal systems in Selective Service, and with Sulective Services' General Counsel Henry Williams.

They told me at that time that they were about ready to refer seventy-five to one hundred matters to the Department of Justice in approximately mid-June for investigation and possible prosecution.

They told me at this time that these were self-reported, these were people who had come to their attention, that is, Selective Service's attention, by reporting themselves.

I saw two possible problems with proceeding with these cases at that time. The first possible problem was that the Supreme Court had a substantial challenge to Selective Service registration then pending before it.

The second problem was at about the

(Pg. 27, line 13 - pg. 28, line 8)

time of this memorandum there was some statement in the papers that indicated the White House might have opposed -- would oppose or was not in favor of a draft, a mandatory draft, and I did not wish to go forward with prosecutions that might be publicly perceived as inconsistent with the administration's policy.

I raised these two issues in my memorandum. It was sent, initialed by Mr. D. Lowell Jensen, and went to Rudolph Juliani.

I then, of course, said at the end:

> "In the absence of any contrary direction from the Associate's Office that we would take the matters, review them and refer them to the Federal Bureau of Investigation if such referral was warranted for investigation."

(Pg. 28, lines 9-28)

Q And with that I direct your attention to Exhibit number 4 and ask if you can identify that.

A This is a memorandum that I received in my office.

I received it on or about June 25th, right in that time period, in any event. It's from Rudolph Juliani to D. Lowell Jensen, and it's --

Q For the record, who is D. Lowell Jensen?

A D. Lowell Jensen is the Assistant Attorney General in charge of criminal division.

THE COURT: And Mr. Juliani?

THE WITNESS: Mr. Juliani -- I'm sorry -- is the Associate Attorney General for the United States Department of Justice.

Okay. This is a response to my memorandum, to what is now government's Exhibit 3.

Mr. Juliani in the memorandum says

(Pg. 28, line 25 - pg. 89, line 19)

that he and the Attorney General have discussed the questions that I raised in the memorandum, that he decided as I -- or if I could say -- we suggested in the memorandum that we should initiate no prosecutions until the Supreme Court rules.

However, he also saw no inconsistency between initiating prosecutions and the administration's policy. And he then directed us to begin drafting prosecutive policy guidelines.

He also suggested three possible ways that we could approach prosecutions in this area.

The first was to prosecute all who failed to register; the second was to prosecute those who refused to register after a warning.

He said, of course, that these were tentative suggestions on his part.

Q And with that I direct your attention

(Pg. 29, line 20 - pg. 30, line 14)

to Exhibit 5B.

MR. ROMERO: I would ask the Clerk to place 5B and 6 before the witness.

THE COURT: Surely.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q Please identify that.

A Yes, I do have 5B before me.

As I testified, the Juliani memorandum hit my desk on or about June 25th, which was -- June 25th was the day that the Supreme Court decided the sex discrimination challenge against Selective Service registration and upheld Selective Service registration.

I then began to draft my suggestions for what prosecutive guidelines should be.

At that time I had had further information and contacts with Selective Service. I was told that the first group over would consist of approximately one hundred and

(Pg. 30, line 14 - pg. 31, line 8)

seventy cases.

Q Please identify this draft or this memorandum in front of you.

A I'm sorry.

This is a memorandum for my signature -- and I drafted it myself -- to Lawrence Lippe, who is the Chief of the general litigation and legal advice section of the criminal division.

Q And the purpose of this memorandum?

A This is the first cut, the first draft of prosecutive policy.

Q And what is the prosecutive policy that you are recommending?

A Well, something very important here. This memorandum does show my concern over Selective Service's developing an active enforcement system, plus the fact that the people that I am dealing with, which is, of course, primarily Ed Frankle, prefer social security records match in order to develop

(Pg. 31, lines 8 - 24)

this active system.

My policy that I recommended is that we should review all the referrals, that the purpose of that review is to identify the crank names, those matters that might not have sufficient information in which to warrant an investigation, to find out if there are any problems in the files.

I have never seen one of these files. Ed Frankle didn't go line by line and tell me what I was going to get.

I had to look at the file in order to understand what I was getting and how best to handle it.

We would refer such matters over to the Federal Bureau of Investigation if they, apparently, involved a person who should have registered but did not, we would tell the Bureau to refer investigative reports to the United States Attorneys with copies to us.

(Pg. 31, line 25 - pg. 32, line 17)

At the time of the referral we would send to United States Attorneys' Offices some general material which we prepared, and that the policy itself would be that all persons brought to our attention by Selective Service should be penalized if they should have registered, that all those who registered between the time of referral and indictment should be offered the opportunity to participate in the pretrial diversion program, and those who refused to register should be prosecuted.

I then said that the policy should be subject to exception if compelling reasons exist, and if it is authorized by the criminal division, by us.

Once again, I didn't know what we were going to get. I had to see what was at the end of the system and whether or not there was some kind of very, very compelling reasons for not doing prosecutions.

(Pg. 32, line 18 - pg. 33, line 11)

Q And please identify Exhibit number 6, concerning its relevance to the preceding memoranda.

A Yes, it is. Exhibit 6 is a memorandum drafted from D. Lowell Jensen, the Assistant Attorney General in charge of the criminal division, and to the Attorney General.

And it is captioned "Prosecution of Selective Service Cases". It was sent from criminal division July 14, 1981.

Q And please describe the particular significance of this memorandum.

MR. ROSENBAUM: I am going to object on foundation grounds. Again, the only person who can talk about what was intended there and the significance is Mr. Jensen.

THE COURT: That is overruled. You may proceed.

THE WITNESS: What happened is I sent what is government's Exhibit 5B into the

(Pg. 33, line 11 - pg. 34, line 6)

system. I sent it to my section chief.

My section chief, I know from speaking with him and seeing the documents, sent it --

BY MR. ROMERO:

Q Who is that?

A That is Larry Lippe, L-i-p-p-e -- he sent it across the street.

"Across the street" to us means to Mark Richard, who is the Deputy Assistant Attorney General for criminal division.

This memorandum, to the extent you are dealing with the memorandum itself, "this memorandum" meaning the July 14th memorandum, is almost verbatim what I wrote.

However, attached to it, the third page, which is captioned "Selective Service Enforcement Program" is significantly different from my drafting.

This document that is government's Exhibit 6 was either drafted by Mark Richard,

(Pg. 34, lines 6 - 25)

whom I believe to be the case, or by D. Lowell Jensen.

Q And what is the significant departure from your recommendation?

A The most significant departure is in paragraph four.

The United States Department of Justice was to adopt what I call a beg policy, we were to beg people to register before we prosecuted them.

It says:

"The United States Attorney will notify the subject by registered mail that the referral has been received, that the knowing failure to register is a felony and that unless registration is accomplished within a specified time prosecution will be considered.

(Pg. 35, lines 2 - 22)

"In appropriate cases the United States Attorney will indicate his or her willingness to meet with the subject to discuss any mitigating factors suggesting the prosecution not be initiated."

It also says:

"And no cases will be deprived or dismissed without express authorization from the criminal division", from us.

Q Now, at that time had there been any referrals from Selective Service?

A At the time of July 14, 1981, no.

MR. ROMERO: I ask the Clerk to place Exhibits 7, 8, 9B, 10 and 11 before the witness.

THE COURT: Surely.

(Said Exhibits before witness.)

(Pg. 35, line 23 - pg. 36, line 15)

THE WITNESS: Thank you.

BY MR. ROMERO:

Q I ask you to identify Exhibit number 7.

A Exhibit number 7 is a letter drafted from -- well, it's a letter drafted for the signature of and assigned by Edward A. Frankle, Associate Director policy development, administrative legal systems, in the Selective Service system to Lawrence Lippe, Chief of the general litigation and legal advice section of the criminal division of the United States Department of Justice.

This was a letter that was hand carried along with one hundred thirty-one files of alleged non-registrants and presented to me on July 20, 1981.

Q And can you please identify Exhibit number 8.

A When I received what is now government's Exhibit number 6 with the redrafting

(Pg. 36, line 15 - pg. 37, line 6)

of policy on the back of it I knew that I needed to draft the memorandum that changed that policy into some kind of form in which it could be disseminated to United States Attorneys.

Government's Exhibit number 8 is a memorandum that I drafted for the signature of D. Lowell Jensen directed to all United States Attorneys. And, indeed, I ensured that once it was signed that it was disseminated to all the United States Attorneys.

Q And what does this memorandum deal with?

A It deal with prosecutive policy concerning alleged non-registrants.

Q And what is that prosecutive policy?

A Well, the policy is that when Selective Service has an address for a possible non-registrant it sends a registered letter to such person.

(Pg. 37, lines 7 - 24)

When the possible non-registrant continues to refuse to register, or when Selective Service does not have a different address it refers it to us in the criminal division.

The criminal division will refer such matters that appear to warrant investigation to the Federal Bureau of Investigation with copies to United States Attorneys.

At the appropriate time the United States Attorney is directed to notify the subject by registered mail that he has been identified, he is to enclose with the registered letter a special registration form prepared by Selective Service, and he will be informed that unless he registers within a specified time prosecution will be considered.

Also, when appropriate, United States Attorneys are directed to offer to meet with the subject to discuss any factors which may militate against prosecution. We ask the copy of the non-registrant letter be sent to us, that is, Larry Lippe, Chief of the section.

(Pg. 37, line 24 - pg. 38, line 16)

When a non-registrant registers prior to indictment the investigation is to be terminated; no prosecution is to be brought.

If you would like, also, when a non-registrant registers after indictment but before trial the United States Attorney is to seek the imposition of an appropriate sentence from a pretrial diversion probation: if a non-registrant continues to refuse to register he will be prosecuted unless compelling reasons exist which warrant a declination.

And no cases or matters are to be declined without prior authorization from the criminal division.

The United States Attorney is also

(Pg. 38, line 16 - pg. 39, line 8)

directed to contact the number of the Department in the event they have any questions or problems. That is my number.

Q So this represents the division's prosecutive policy on Selective Service on registration cases?

A It represents the division's prosecutive policy then, to and including this date, that is correct.

Q And it included the so-called beg policy you talked about?

A It definitely included the beg policy.

Q As far as you know, in the formulation and enforcement of the policy set forth in government's Exhibit 8, as far as you know was there any intent to single out for prosecution individuals because they were vocally opposing the draft registration? As far as you know.

MR. ROSENBAUM: Your Honor, I object on

(Pg. 39, lines 9 - 25)

foundational grounds to find out what the precise extent of this individual's knowledge is.

THE COURT: Whatever it is, he is being asked a question as far as he knows.

You can go into it further on cross-examination, if you care to.

MR. ROSENBAUM: All right.

THE COURT: That is overruled.

You may answer.

THE WITNESS: There was absolutely no intention to single out vocal non-registrants in order to deter them from exercising their First Amendment rights, absolutely none that I know about.

I did everything that I could in all the memos that I drafted, that I could, I tried to alert people to possible problems.

The idea was to avoid the problems, not to engage in any kind of selective prosecution.

. . .

(Pg. 40, lines 8 - 21)

Kline - Direct by Mr. Romero

THE COURT: Go ahead.

BY MR. ROMERO:

Q I ask you to identify briefly Exhibit number 9B.

A This is simply an internal memorandum concerning the Freedom of Information Act request which would have included our prosecutive policy.

Because the policy is -- oh. I drafted the memorandum. I'm sorry. It's from Lawrence Lippe, Chief, to Fred Hess, who is the Acting Director of the office of legal support services in the criminal division.

It is the office of legal support services which handles Freedom of Information Act requests.

Q I ask you to identify Exhibit number 10.

(Pg. 40, line 22 - pg. 41, line 15)

A Exhibit number 10 is a copy of a letter signed by Edward A. Frankle. It is addressed to Lawrence Lippe, Chief of the general litigation legal advice section, criminal division.

This is the letter that Mr. Frankle hand carried to me along with forty-nine new individuals on October 21, 1981.

Rather than "new individuals" I should say forty-nine new files of alleged non-registrants with the Selective Service system.

MR. ROMERO: And I would like the Clerk to place Exhibit numbers 11, 12 and 13 before the witness.

THE COURT: Surely.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q Do you have exhibit number 11 before you now?

A I have Exhibit number 11.

(Pg. 41, line 16 - pg. 42, line 9)

Q Please identify that.

A Thank you. Exhibit number 11 is simply a memorandum to files from me, memorializing what I did with the forty-nine newly referred files.

And that is I referred forty-six of them to the Federal Bureau of Investigation, John McNabb, who is my contact in the FBI, and directed my secretary, of course, to make copies and send them out to United States Attorneys' Offices.

Q With respect to the cases referred by Selective Service to you on the two occasions you have testified about, the one which you then referred to the FBI, did one of those cases involve David Alan Wayte?

A Mr. Wayte was referred -- well, the file concerning Mr. Wayte was referred to the Department of Justice --

THE COURT: Well, is your answer "Yes" to that question?

(Pg. 42, line 10 - pg. 43, line 4)

THE WITNESS: I'm sorry. The answer is yes, your Honor.

THE COURT: All right. You may explain your answer further if it needs explanation.

BY MR. ROMERO:

Q And which referral was that that you received from Selective Service?

A Mr. Wayte was referred in the first referral, the first referral being either in the one hundred thirty-two files hand delivered to me on July 20,1981 by Mr. Ed Frankle, or two days later, two files which had been inadvertently omitted from the July 20th transmittal to me.

Q And what did you do with the Wayte file?

A I handled Mr. Wayte's file as I handled everyone else's filed, when -- the hundred and thirty-four files --

(Water handed to witness.)

THE WITNESS: Thank you -- were delivered

(Pg. 43, lines 4 - 22)

to my office, when I had the opportunity I reviewed each and every one of them to learn what was in the files, what possible problems existed for us to look, as I said before, for fictitious names, files that didn't have sufficient addresses on which to predicate an investigation and anything else that I might find.

I found files that, apparently, involved illegal aliens whom I was informed were probably not any longer within the United States.

Those files I took the identifying information and referred to the Immigration and Naturalization Service and asked the Service to tell me, A, are these people still within the United States and, B, if they are what are their present addresses.

Two of the files in the initial referrals were people with insufficient addresses. What happened is Selective Service

(Pg. 43, line 22 - pg. 44, line 15)

had taken the letters out of the envelopes, had, apparently, lost the envelopes. So all we had were letters with the signature on them -- no other identifying information, other than the person apparently resided somewhere within the United States.

There was insufficient information to predicate an investigation of those two files, and I took them out.

In addition, there were several people who registered. Those people, since they fell within the policy of registering prior to prosecution, I took them out.

Everyone else who appeared to be within the class of people who must register and had not done so I referred to the Federal Bureau of Investigation for investigation with copies to the United States Attorneys' Offices.

Mr. Wayte, upon my review of the file, appeared to be a person who might be

(Pg. 44, line 15 - pg. 45, line 8)

within the class of people who must register and who hadn't done so and, consequently, I referred his file.

THE COURT: Mr. Kline, is it true that illegal aliens found in this country are subject to registering?

THE WITNESS: It is true, your Honor, they are.

THE COURT: All right.

THE WITNESS: Any male person residing in the United States is required to register unless --

THE COURT: Regardless of legal status in the country?

THE WITNESS: That is correct, unless you are a non-immigrant.

And if you are a non-immigrant you need not register. But illegal aliens would not be classified as non-immigrants.

THE COURT: I see. Thank you.

BY MR. ROMERO:

(Pg. 45, line 9 - pg. 46, line 2)

Q Did you give the Wayte case any special handling?

A Absolutely none. He was just one of a number of files.

Q And in referring his case to the FBI for possible prosecution was there any intent on your part to single him out for prosecution because he had vocally -- he may have vocally opposed draft registration?

A No. We're at the beginning of a system, and I don't know what is going to happen down the line.

THE COURT: Just a minute. Let me, again, ask you to answer the question first. And if it needs explanation you may make an explanation.

THE WITNESS: I'm sorry, your Honor.

Absolutely no intention on my part.

BY MR. ROMERO:

Q And please explain.

A We were at the beginning of the

(Pg. 46, lines 2 - 18)

system. We didn't know what was going to happen down the line.

It was my hope, perhaps a little bit fantasy like, but I was hoping, frankly, that everyone would register and we wouldn't have to have prosecutions, including Mr. Wayte.

Q I ask you to identify Exhibit number 12.

A Exhibit number 12 is composed of two things. The first portion of the exhibit is from Lawrence Lippe, who is my Chief, to D. Lowell Jensen, the Assistant Attorney General.

It was sent from Mr. Lippe to Mr. Jensen on December 17, 1981. The subject is "prosecution of Selective Service non-registrants".

Attached to that memorandum is a teletype to all United States Attorneys, which was sent, my recollection has it, late

(Pg. 46, line 18 - pg. 47, line 11)

December of 1981.

Q And, just briefly, what is the substance of that message in the telegram?

A The message in the telegram is simply confirming something that all districts with active cases in them should have been told by telephone, what they should have been told by telephone.

And it is that the United States Attorneys are directed not to seek indictments of persons who allegedly are required to register with the Selective Service system, but who fail to do so, essentially until further direction from the Department of Justice.

MR. ROMERO: I ask that Exhibits 13, 14B, 15B and 16B be placed before the witness.

THE COURT: Very well.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q Please identify Exibit 13, placed

Pg. 47, line 11 - pg. 48, line 6)

in the context of the events at that time.

A Exhibit 13 is a memoranda from Lawrence Lippe, who is my Chief, to D. Lowell Jensen, the Assistant Attorney General.

It was typed January 11th, 1982. It was drafted by me.

Q And what was the context of the time in which this was prepared by you?

A Well, as shown by the former exhibit, we had shut down prosecutions of Selective Service and non-registrants.

The President had, by the time of the typing of government's Exhibit 13, declared that he would go forward with the registration scheme and that there would be a grace period for persons who had not registered till that date so they could register without fear of prosecutions.

This was an endeavor to give Mr. Jensen -- and endeavor by me to give Mr.

(Pg. 48, lines 6 - 22)

Jensen several possible policy options to consider, because at that time we were being told by the news media that there were eight hundred thousand alleged non-registrants out there.

And, of course, there might be some difficulty with prosecuting eight hundred thousand people.

THE COURT: Did you generally get your information from the news media?

THE WITNESS: I wouldn't say "generally", your Honor.

I would say certainly it was a source of information for me.

THE COURT: That you relied upon?

THE WITNESS: I relied upon numbers of that nature unless told differently by Edward A. Frankle.

Edward Frankle would be, in large part, my contact for any information of any substance.

(Pg. 48, line 23 - pg. 49, line 16)

THE COURT: All right.

BY MR. ROMERO:

Q And in Exhibit 13 under "present policy" did you there restate the policy of the Department of Justice as being to assure the maximum notice to an alleged non-registrant?

A Well, yes, I did.

I stated:

"Our present policy is designed to assure the maximum notice to an alleged non-registrant."

We're trying to do everything we can to avoid prosecution unless we're forced into it.

Q Just briefly, what were the options that you discussed in this memorandum concerning the problems if there were large numbers of referrals?

A The option would be to continue the

(Pg. 49, line 16 - pg. 50, line 10)

the present policy. The present policy described in this memorandum is, if I can recall the horrible phrase --

(Pause)

Well, in any event, the present policy was to prosecute everyone who was referred to us. We recognized that if the numbers became too large we might not be able to prosecute all of them, in which case backlogs might develop.

However, we might be able to create a credible deterrent without prosecuting everyone who came to our attention.

The second policy would be to increase resources, including new money for position, buth clerical and professional, in the Executive and Judicial branches which would, of course, heighten deterrents and result in more prosecutions.

The third policy was to create a declination policy so the large portion of

(Pg. 50, line 10 - pg. 51, line 3)

the alleged non-registrant cases against them could be declined. I discussed several possible logical bases, one, for example, being trying to decline against people whom the military might not want.

I suggested that if we did adopt such a policy in my opinion that such a group of people was not large enough, really, to have much of an impact in overall numbers.

And, in addition, that the Department of Justice, in my opinion, should not decline cases based on any of the particular categories I discussed, except, perhaps, mental and physical handicap.

I discussed the possibility of declining cases against religious protesters, and at that time I said that the major problem with any such declination policy is that we do not want insincere believers to escape prosecution.

Therefore, United States Attorneys

(Pg. 51, lines 3 - 20)

would be compelled to inquire into and distinguish among religious beliefs, a role which I think in the memorandum says we think inappropriate.

Another possible option is to use constructive registration.

By using a liberal interpretation of constructive registration we could -- I like to phrase it -- stuff people in the computer.

There were two difficulties that I mentioned with that approach in this memorandum. The first was the one instance that we had endeavored to do so failed rather miserably when the alleged non-registrant apparently moved.

The second was that the policy, to the extent that it became known, would be self-defeating. Registration depends upon people going to the Post Office and doing something. If we are going to do all the

(Pg. 51, line 20 - pg. 52, line 14)

work for them and stuff them into a computer no one would in fact go down voluntarily and register.

Or at least we would have greater numbers of people not registering.

The final policy option was for streamlining the system, developing some kind of alternative penalty, some kind of new approach that we might use other than full felony prosecution.

And I rejected that. And, of course, this memorandum was signed by Lawrence Lippe. So it is phrased in the "we".

I rejected it because it is, of course, accepted that the greater the penalty the greater deterrence.

Secondly, you know, at least as I perceived it sitting at my desk, the administration position, favored decrease in the penalty, might be perceived as a softness on the issues of military preparedness.

(Pg. 52, line 15, pg. 53, line 18)

And, third, that what would happen is that a reduced penalty would require some kind of legislation, and that would mean that we might have to delay prosecutions even more.

And if we delayed such prosecutions we may even end up with greater and greater numbers of non-registrants.

Q And the conclusion was?

A That we continue as we had, which was taking what we got from Selective Service and putting them out for prosecutions.

If we became swamped we would deal with it when we understood the magnitude of the problem.

Q Now, during this period of January '82 through March and of '82 did you have any concerns about the absence of an Active Enforcement program?

A Well, as indicated in one of much earlier memoranda, I always wanted some

(Pg. 51, line 8 - pg. 52, line 3)

kind of Active Enforcement System.

I have always wanted some way that the Service would go out and actively identify alleged non-registrants.

And the answer to your question is yes.

I'm sorry, your Honor.

THE COURT: All right.

BY MR. ROMERO:

Q I would like you to identify Exhibit 14B.

A Pardon me?

Q Exhibit 14B. Is that before you?

A Okay. Exhibit 14 B is a copy of a letter I drafted for the signature of D. Lowell Jensen, the Assistant Attorney General, to Mr. Herbert C. Puscheck, who was then the Associate Director for plans and operations in the Selective Service system.

Also attached is a handwritten memorandum of mine.

Q And did Mr. Jensen sign this draft

(Pg. 54, lines 4 - 21)

that you prepared?

A No. This letter was never sent.

Q Please identify your purpose in drafting this letter.

A As best I recollect through my contacts in the Selective Service system I had managed to get ahold of one of their memoranda which was captioned "increasing Selective Service registration compliance."

I wanted to comment on that memorandum. I wanted to push the Service to the maximum extent that I could, toward an Active Enforcement System, identifying actively alleged non-registrants and not simply waiting for them to come to their attention.

Q Let me stop you right there for a second. You used the term "push". Had you identified any reluctance on the part of the Service to advance to an Active Enforcement program?

A No. All the people that I dealt with

(Pg. 54, line 21 - pg. 55, line 15)

were heavily in favor of an active identification or Active Enforcement program.

I wanted to get as much momentum, as much push, I wanted the name, if possible, of the criminal division behind the idea of actively identifying non-registrants, although the people with whom I dealt were quite receptive to the idea.

And they always had been from my earliest meeting with them.

Now, I guess I then have to hasten to add I don't want to paint myself as the ultimate pusher in the United States Government for the Active Enforcement program, and I am sure Mr. Frankle will have his own ideas on it when he testifies.

But that is something that I wanted very much. And our ideas intertwined here.

Q I would like to direct your attention to page four of that letter, the third paragraph.

(Pg. 55, line 16 - pg. 56, line 14

MR. ROMERO: I beg the Court's indulgence. This is a rather critical paragraph, and I think it should be read out loud.

THE COURT: Surely. You may do so.

This is the letter that was never sent?

MR. ROMERO: Yes, your Honor.

THE WITNESS: That is correct, your Honor.

THE COURT: All right. Page four?

BY MR. ROMERO:

Q Could you read that third paragraph.

A "Unfortunately we believe that if the government initiates prosecutions with only the present Passive identification scheme in place there exists a real risk that the United States will lose at least a few of the initial cases.

"There is a high probability

(Pg. 56, line 14 - pg. 57, line 16)

that persons who write to the Service and that persons who are reported by others are vocal proponents of non-registration.

"Since a Passive identification scheme necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted the prosecution of a vocal non-registrant will, undoubtedly, lead to claims that the prosecution is broad in retribution for the non-registrant's exercise of his First Amendment rights. See United States versus Falk, 479 F.2d, 616, Seventh Circuit 1973 en banc.

"Indeed, with the present universe of hundreds of thousands

(Pg. 57, line 16 - pg. 58, line 12)

of non-registrants the chances of a quiet non-registrant" -- strike that -- "the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning."

THE COURT: Those were your words?

THE WITNESS: They are my words, your Honor.

THE COURT: All right.

BY MR. ROMERO:

Q First of all, when you drafted that was it your belief that the Passive Enforcement scheme was defective because it resulted in impermissible selective prosecutions of vocal non-registrants?

A Absolutely not. Had I ever thought that we were dealing with an unconstitutional scheme I would have done my maximum to shut down -- shut down the system and you would

(Pg. 58, line 12 - pg. 59, line 4)

be reading scads of documents that say this is what my belief is.

Q So in your own words what was your purpose in being that dramatic in setting forth that paragraph?

A I wanted as graphically as possible to demonstrate the idea that the government should be as fair and honorable and just as it can, that it should actively go out and seek non-registrants.

It was my intent to be graphic to get the Service to push, although, as I have said, I had no indication they would do otherwise or were doing otherwise, but I wanted whomever the decision makers were, to the maximum extent possible, to push for the Active Enforcement System.

Q And, continuing to the next paragraph without reading it, what was your proposal to avoid the risk of possible losses due to claims --

(Pg. 59, lines 5 - 23)

A In order to place --

THE REPORTER: I'm sorry, your Honor.

THE COURT: What was the end of your question"

BY MR. ROMERO:

Q -- possible losses due to claims of Selective Service prosecution?

A In order to place the government in the best possible light it would have been, of course, much better to have an Active Enforcement program in existence at the time of the first prosecution.

I said and I would like to quote this:

"In order to avoid the risk of initial losses of non-registrant cases and the probable consequence of diminishing registrations we belive that Selective Service must create a program of Active identification

(Pg. 59, line 23 - pg. 60, line 17)

which will be functioning, well on the way towards functioning at the time of the first non-registrant prosecution."

And I then, of course, in a footnote said that I didn't want some kind of enforcement system that left gaps in states.

If states, for example -- and this was my understanding at the time -- would not make driver's license lists available we might have lots of numbers of non-registrants, but there may be gaps, whole states, we simply might have in that kind of enforcement program for.

I didn't want that. And my suggestion was, of course, that Selective Service have the options that were presented in the memorandum.

I wanted the use of a social security number match.

(Pg. 60, line 18 - pg. 61, line 10)

Q Do you know why this letter was not approved and sent out?

MR. ROSENBAUM: Excuse me. There has been no testimony that this letter was not approved. There has just been testimony that it was not sent out.

BY MR. ROMERO:

Q Do you know why the letter was not signed?

THE COURT: The record will speak for itself.

Yes, you may answer the question.

THE WITNESS: Well, it was not signed. Attached to it is a handwritten note that, essentially, reflects portions of the communication that I had with James S. Reynolds, my principal Deputy Chief.

THE COURT: Is this in your handwriting?

THE WITNESS: That is my handwriting, your Honor.

Mr. Reynolds told me that if Mr.

(Pg. 61, line 10 - pg. 62, line 3)

Jensen wanted a shorter letter he didn't want us to specifically recommend an enforcement policy, although he was in favor of the idea of an Active Enforcement System, and I was supposed to take my lightning sentence out of the letter.

There is, of course, further discussions --

THE COURT: Otherwise lightning might strike.

THE WITNESS: I would surely hope not, your Honor.

THE COURT: Go ahead.

THE WITNESS: I think -- This is before there was any prosecutions, your Honor.

The criminal divison at this time, this is March 2nd, 1982, is not even on record that there would be a prosecution.

What you see here, my best interpretation of it, is not that we are embarrassed over the "lightning strike" sentence,

(Pg. 62, lines 3 - 22)

but it is that the criminal divison itself, as an institution, since it hasn't decided to go ahead with prosecutions, cannot quite be so graphic in its language of creating an Active Enforcement System which will yield loads and loads of alleged non-registrants when we haven't even decided that we are going to prosecute them.

It is more of bringing policy and timing into play here rather, I think, than as much embarrassment about the sentence as I am suffering right now.

THE COURT: All right.

MR. ROMERO: I would ask the Clerk to place Exhibits -- You may have 15B already, but if you don't, 15B, 16B, 17B.

THE COURT: Very well. Does he have those, Ms. Kato?

THE WITNESS: I do not have 17B.

(Said Exhibit before witness.)

THE WITNESS: Thank you.

* * *

(pg. 63, line 22 - Pg. 64, line 13)

Kline - Direct by Mr. Romero

Q Mr. Kline, would you please identify Exhibit 15B in front of you.

A Exhibit 15B is a letter -- strike that -- is a memorandum which I drafted from Lawrence Lippe, Chief, to D. Lowell Jensen.

And it is captioned, "Use of Civil Injunctions to Compel Registration with Selective Service".

Q What was the purpose of your drafting this memoranda, being in a criminal division, talking about civil injunctions and registration cases?

A Well, perhaps better than anything else this memorandum exhibits what I meant, that when I testified the criminal division collectively had not yet made up its mind how it was going to deal with Selective

(Pg. 64, line 13, pg. 65, line 7)

Service non-registrant prosecutions.

Here it is March 17, the date the memorandum was sent. The grace period is over, and, as the memorandum indicates, or at least as was related to me. Mr. Jensen is asking for a memorandum on the use of civil injunctions to compel registration with Selective Service.

Q I ask you to identify Exhibit 16B.

A Yes. Exhibit 16B is a copy of a memorandum which I drafted from Lawrence Lippe to D. Lowell Jensen.

And it is captioned "prosecutive policy in Selective Service non-registrant cases".

This copy only indicates a typing date. It was sent March 23, 1982.

THE COURT: How do you recall that?

THE WITNESS: I have seen the file copies. And, if you recall, your Honor, attached to Mr. Jensen's affidavit you have

(Pg. 65, lines 7 - 24)

a copy of the -- the first, the original copy which has the date on it.

THE COURT: Yes. Thank you.

BY MR. ROMERO:

Q Now, directing your attention back, just for a moment, to Exhibit 148, which was that letter for Mr. Jensen's signature that was never signed, in which the "lightning strikes" language is contained, do you know if a revised draft was ever prepared? And, if not, why not?

A No, it was not prepared. It was not sent out because, essentially, events overtook it.

As I understood it, the Military Manpower Task Force did indeed give its approval to Selective Service having access to social security records and going ahead with the social security record match and, therefore, what I thought at the time was a near perfect Active Enforcement System.

(Pg. 65, line 25 - pg. 66, line 19)

In other words, the need for the memorandum of the letter, the extra push that I was trying to give, wasn't needed.

It carried itself all by its own weight.

Q And does the memorandum, Exhibit 148, relate that information, that the Military Manpower Task Force had endorsed that Services plan?

A Yes, indeed. Government's Exhibit 148 does that in the second paragraph.

Q And is there any signature to this document?

A There is a very significant document. It is very significant because this is the memorandum that triggered the ultimate decision on going ahead with prosecutions and going ahead with prosecutions in the -- what we have now called or learned to call the Passive Enforcement System.

I began the memorandum, of course,

(Pg. 66, line 18 - pg. 67, line 11)

by laying out what information I knew, as indicates from the heading under roman numeral I.

Ed Frankle was my primary source of information. Perhaps -- your Honor, I do want to make clear here that he was my primary source of information.

And it indicates that he is going ahead with the Active program. He was, as I understood it, primarily the person in charge in creating an Active Enforcement program.

And his best estimate, as related to me, was that unless social security was able to speed up its processes or they were compelled to speed up their processes the earliest non-registrants that we would have identified pursuant to the Active Enforcement System would be early 1983.

Q And when was it that registration was first required?

(Pg. 67, line 12 - pg. 68, line 3)

A The first --

Q During this period?

A The first day of registration was July 21, 1980.

Here it is, again, two years almost after the first registration. From the newspapers I'm learning that there are allegedly five hundred and twenty-seven thousand non-registrants.

The grace period has been announced, and it is over. That's the position we are in at the time that I am writing this memorandum.

THE COURT: And the grace period has ended when?

THE WITNESS: February 28, 1982.

THE COURT: And this was sent out March 23, 1982?

THE WITNESS: That is correct, your Honor.

THE COURT: All right.

(Pg. 68, lines 4 - 24)

BY MR. ROMERO:

Q Now, directing your attention to page two, did you have any discussion in your memorandum concerning the options and the policy of going forward and not going forward at that time with Passive identified non-registrants?

A Yes, I did have such a discussion in this memorandum.

Q And what is it?

A Would you like me to read it?

Q It is in the last paragraph, last full paragraph, excluding the footnote, on page two.

MR. ROMERO: Your Honor, this is significant so I will ask the witness to read it.

THE COURT: Very well.

THE WITNESS: And I say:

"A way to avoid these problems is to hold prosecution of

(Pg. 68, line 24, - pg. 69, line 22)

the 'Passive identification' non-registrants until the Service is able to identify non-registrants by an Active System.

"Assuming that the 'Active identification' non-registrant class is so large that prosecution of everyone is impracticable we could apply the same selection standards to the 'Passive' referrals as to the 'Active' referrals.

"That only would be able to avoid the 'Passive' legal problems. We could probably even avoid some of the 'Passive' prosecutions.

"Nevertheless, we cannot ..." --

I'm writing this memorandum, of course, for Larry Lippe --

(Pg. 69, line 23 - pg. 70, line 25)

"... we cannot recommend putting the 'Passives' on hold until the 'Actives' are referred.

"We are precluded from doing so by one factor -- time. If the Department of Justice waits until late this year to institute prosecutions of non-registrants the registration scheme will suffer greatly.

"Consequently, we reluctantly conclude that United States Attorneys should be directed to proceed to prosecution with the matters which have already been referred to them. We attach a memorandum to the United States Attorneys containing such a direction, if you agree."

Q So government's Exhibit 16B constituted

(Pg. 71, lines 1 - 19)

the operative vehicle for going forward with the prosecutions after the end of the grace period based on referrals from the Passive Enforcement System?

A The operative vehicle would be the teletype that went out to all United States Attorneys, which was a derivative of the teletype that I had attached here.

This memorandum would be the catalyst, as I see it. This memorandum is the discussion of the policy issues here, laying out the alternatives of the Assistant Attorney General and recommending a course of action.

MR. ROMERO: For your Honor's information that teletype is attached to the excised portion of Exhibit 16B.

THE COURT: Yes. Thank you.

MR. ROMERO: I would like you to identify --

THE WITNESS: May it please the Court, your Honor. I am sorry to interrupt.

(pg. 71, line 20 - pg. 72, line 12)

That teletype that is attached to the copy you have is not the one that was sent out to all United States Attorneys.

The teletype that you have is the one that was attached to here and subsequently was redrafted.

THE COURT: I see. So where is the one that was sent out?

THE WITNESS: I do not have it in front of me.

THE COURT: Mr. Romero, do you have it?

THE WITNESS: In fact, it wasn't sent, if my memory serves me correctly, until today, your Honor.

THE COURT: I see.

MR. ROMERO: It isn't an item we are introducing, your Honor, but defense counsel and government have that item.

THE COURT: What is the item number, exhibit number?

MR. ROMERO: I do not believe it is

(Pg. 72, line 12 - pg. 73, line 10)

included in any of the exhibits that we have before your Honor presently.

THE COURT: If you can locate it I would like to see it.

MR. ROMERO: If I could have a moment, your Honor, I could do that.

THE COURT: Surely.Go right ahead.

(Mr. Romero hands document to Clerk.)

THE COURT: Thank you.

MR. ROMERO: Your Honor, I would ask that that item be marked Exhibit number 48.

THE COURT: All right. It will be so marked for identification.

(Plaintiff's Exhibit 48 was marked for identification.)

THE COURT: Now, on this item I see a date of 6-15-82.

MR. ROMERO: Your Honor, it may not be the teletype I thought it was.

THE WITNESS: Your Honor, if I may, my recollection is that that one is not the

(Pg. 73, line 10 - pg. 74, line 6)

particular teletype to which I am referring.

Perhaps if I were allowed to leave the witness stand I may be able to assist?

THE COURT: Certainly. Why don't you step down and do so.

THE WITNESS: Thank you.

THE COURT: And I will hand this back.

(Mr. Kline approaches the podium, confers with Mr. Romero, and returns to witness stand.)

MR. ROMERO: I would ask the Clerk to place government's Exhibit number 21 before the witness.

THE COURT: Is this the item in question?

MR. ROMERO: Yes, your Honor.

THE COURT: Very well.

(Said Exhibit before witness.)

THE COURT: And do I have a copy of that?

MR. ROMERO: Yes, your Honor.

THE COURT: Very well.

BY MR. ROMERO:

Q Mr. Kline, is this, indeed, the

(Pg. 24, lines 7 - 25)

item to which you have made mention?

A This is the first --

THE COURT: May 21, 1982?

THE WITNESS: It was sent May 24, 1982, your Honor, the teletype itself.

THE COURT: I see.

THE WITNESS: The memorandum on top, the transmittal memorandum, would be to Jensen, is dated May 21st, 1982.

The teletype, proposed teletype that I had attached to government's Exhibit 16B, was kind of like the first draft.

There are a number of definitions that had to be made in putting it out to United States Attorneys' Offices, things like sentencing recommendations, whether or not they were included in the teletype and it went through this two-month process of deciding how we exactly would inform United States Attorneys that they were to go ahead with the cases.

(Pg. 75, lines 1 - 20)

THE COURT: I see.

THE WITNESS: And, in addition, of course, you see, it's May 24th. The Service wasn't able to tell us who registered or not until May 14.

THE COURT: All right.

BY MR. ROMERO:

Q Now, directing your attention to Exhibit 16B, can you please identify that.

A I'm sorry. That was 16B?

Q Yes.

A I have, I believe, identified this. This is the memorandum which was sent by Lawrence Lippe to D. Lowell Jensen on March 23, 1982. And it is captioned "prosecutive policy in Selective Service non-registrant cases".

Q And what was your purpose in preparing this memorandum?

A I was told that Mr. Jensen wanted our views on prosecutive policy, now that

(Pg. 75, line 20 - pg. 76, line 14)

the grace period had ended.

This is the document to which I previously testified and said that essentially I got information from Edward Frankle that we wouldn't have any results concerning an Active Enforcement System, we wouldn't have any name or be able to have any names to the Department of Justice from an Active Enforcement System until early 1983 or, perhaps, if the social security people were able to speed up their process, possibly by Fall of 1982.

Q I would like you to identify Exhibit number 18B.

MR. ROMERO: I ask the Clerk to place 18B, 19B, 20B and 21 before the witness.

THE COURT: Very well.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q First 18B. Can you please identify that?

(Pg. 76, line 15 - Pg. 77/line 9)

A 18B is a memorandum which I drafted for my own signature or initialing to Lawrence Lippe, who is my Chief.

The unexcised portion is captioned "Social Security Records Match End".

Q And what was the purpose of preparing this memorandum?

A Larry Lippe, my Chief, asked me to prepare a legal memorandum, essentially on the effect of reducing or possibly reducing the offense of failing to register to a misdemeanor.

He also wanted to know whether or not any such reduction might somehow limit access to social security records or limit access to Internal Revenue Service records.

Q I ask you to identify Exhibit number 19.

A Exhibit number 19 is a letter signed by Edward A. Frankle of the Selective Service system to Lawrence Lippe, my Chief.

(Pg. 77, line 10 - pg. 78, line 1)

This was a letter which I understand was included with the hundred and three new referrals referred to the Department of Justice -- I was not there, I was out of town at this time -- to my principal Deputy Chief James S. Reynolds.

The letter also included names of people who had previously been referred to the Department of Justice but who, according to Selective Service, had not registered during the grace period.

This is essentially the result, telling us who previously had registered during the grace period and who did not have the people referred by Selective Service before this date, plus a hundred and three new referrals.

Q And what if anything did you do with the hundred and three referrals when you returned?

A I handled a hundred and three the same way that I handled all the former

(Pg. 78, lines 1 - 19)

referrals.

I went through them, I examined the files, I determined whether there would be some problem with sending them out for investigation.

If they appeared to be within the class of people who must register but also appeared not to have registered, I referred the files to the Federal Bureau of Investigation.

If there were, for example, illegal aliens for whom I had some reason to suspect they might not be within the United States I referred names and identifying information to the Immigration and Naturalization Service and asked for information, A, whether they still were in the United States and, B, what their present addresses were.

And, of course, if they appeared to have either registered or not to be within the class of registrants I simply put them

(Pg. 78, line 19 - pg. 79, line 14)

aside.

Q And, directing your attention to Exhibit 20B, can you please identify that for us.

A Okay. Exhibit number 20B is a memorandum from Lawrence Lippe, who is my Chief, to D. Lowell Jensen.

It is captioned "policy concerning prosecution of Selective Service non-registrants", and it was sent on May 19, 1982.

THE COURT: It was prepared by you?

THE WITNESS: I'm sorry. Yes, your Honor, it was prepared by me.

THE COURT: All right.

BY MR. ROMERO:

Q And what was the significance to you of this item?

A At this time, as I previously testified, we still hadn't notified United States Attorneys that they were to go ahead with prosecutions or proceed or not proceed.

We still hadn't notified United

(Pg. 79, line 14 - pg. 80, line 8)

States Attorneys how the Department of Justice was going to handle these things.

There were proposed to me a number of issues. These issues were whether or not we should continue in force our August 17, 1981 policy memorandum, which I previously described as the beg policy, whether the Department should institute a policy that severely disabled non-registrants should not be prosecuted, whether the Department should require the prosecution for counseling violators still receive our prior approval, and whether the Department should require that prosecutions for mon-registrants receive prior Department of Justice approval.

Q And, briefly, what was your answer to those questions?

A I was quite happy to redraft the memorandum, to say that the policy memorandum is still in effect.

It didn't bother me one way or the

(Pg. 80, lines 8 - 25)

other if I drafted the memorandum, excepting severely disabled non-registrants at that time that was described to me as, you know, paraplegics or quadriplegics, that those people should not be registered.

I had no difficulty, of course, suggesting that the Department should require that counseling violators receive prior Department of Justice approval. Indeed, that was our policy at the time.

We were simply continuing that in force. I did have a great deal of difficulty with whether or not the Department should essentially approve prosecution before they were brought, and I reflected in my memorandum my belief that we should not be asked to approve prosecutions before they were brought.

Q And that recommendation of yours, do you know whether or not that was adopted?

A It was adopted.

(Pg. 81, lines 2 - 20)

MR. ROMERO: Exhibit 21 already had been identified.

I ask that Exhibits 22B, 23 and 24B and 25 be placed before the w'tness.

THE COURT: Surely.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q I ask you to identify Exhibit 22B.

A Exhibit numer 22B is a letter which I drafted, signed by Lawrence Lippe, the Chief of the general litigation section, to the Honorable Stephen S. Trott, United States Attorney, for the Central District of California.

It was sent June 8, 1982.

Q And what was the purpose of sending this letter?

A If I may explain a little bit of the predicate first, the Selective Service told me, as I previously testified, who registered and who had not of their previously referred

(Pg. 81, line 20 - pg. 22, line 13)

people.

This letter was to notify Mr. Trott that our records reflected that two matters were still active in his district. What I did was go through all the FBI reports I had received till that time, all the instances that involved, for example, women, you know, put them aside--we're not going to prosecute them -- all that involved people who were too old to register, I put them aside; all the people who had registered, I put them aside.

There were seventy matters still left pending. Two of them, according to my records, were in Mr. Trott's district, one of them being the matter involving Mr. David Wayte.

The essence of it was to tell Mr. Trott, according to the information we had received from Selective Service, Mr. Wayte had not registered, that Mr. Trott was

(Pg. 82, line 13, pg. 83, line 6)

supposed to determine whether the appropriate steps were taken pursuant to our policy memorandum, he should then take the appropriate steps, including obtaining indictments and proceeding to trial.

Q I would ask you to identify Exhibit number 23.

A This is a memorandum to John McNabb, who is my Special Agent -- strike that -- who is my contact in the Federal Bureau of Investigation headquarters.

It reflects my actions concerning the hundred and three new files, and it is dated June 9, 1982.

And also, at the bottom, it has some handwritten scribbling, so I could finally reconcile the number of files. I was having a little difficulty at the time.

I delivered eighty-eight, and there were eighty-nine, that I was coming out with more files than Selective Service had

(Pg. 83, lines 6 - 22)

registered. And the handwritten notes indicate what the error was and how the numbers reconcile.

Q And I ask you to identify Exhibit 24B.

A Exhibit number 24B is a form letter. And if I could backtrack a little, the June 8 letter to Mr. Trott is also a form letter.

All letters were sent out, except when we made a mistake -- We missed three districts the first time we went through, your Honor, and they didn't get their letter dated June 8th.

And I think we managed to send an alleged non-registrant who was in, perhaps, Mississippi up to Massachusetts, or vice versa.

But except for the errors everybody's letter was sent out at the same time, on June 8th. And this is the companion letter. This is the June 10th.

(Pg. 83, line 23 - pg. 84 line 15)

With the exception of the errors that we made, again, wrong districts, mishandling, whatever, all the letters to United States Attorneys reflecting the hundred and three new referrals, after I subtracted the people who were not within the class and, perhaps, the illegal aliens, if they were not, went out to the appropriate districts on June 10th. And that's this letter. And this letter is a form letter.

This particular one is a copy of the letter addressed to Mr. Noonez in the Southern District of California.

And it says, in form letter form, are enclosed one or more files concerning possible violators. I enclosed with this letter, as I did with all the letters, the policy memorandum, the essential elements memorandum, special registration forms and envelopes.

And in all prior copies, in all prior

(Pg. 84, line 16 - pg. 85, line 11)

referrals, but for the very latest, I also enclosed a copy of the form letter which Henry Williams, the Selective Service general counsel, had sent to non-registrants when he -- or, that is, the Service had a sufficient address.

This letter says pretty much the same thing that the June 8th letter says.

"Please take the necessary steps pursuant to the policy memorandum, including obtaining an indictment or indictments and proceeding to trial."

It includes some of the other stuff that we have talked about, like counseling violators, counseling violations need our prior approval, and severely disabled people shouldn't be prosecuted without -- well, shouldn't be prosecuted.

THE COURT: Mr. Kline, you don't suggest that the June 8th letter is a form letter,

(Pg. 85, line 11 - pg. 86, line 5)

as is the June 10th letter?

Isn't it more accurate to indicate that the June 8th letter is, perhaps, based on a form, but has been particularized for this particular district?

THE WITNESS: I'm sorry. You are very much correct, your Honor.

The June 8th letter -- Well, perhaps I should explain it to its fullest extent.

We created two letters, one plural, one singular. Okay? In terms of form.

We then, of course, for the plural, would insert names pending in districts when there was more than one.

Then, of course, change the salutation and the United States Attorneys' address by letter.

But you are indeed correct. Mr. David Wayte was not sent to every district. He was only sent to the district here.

(Pg. 86, lines 6 - 22)

Other districts with the -- well, there are two here. Other districts with the remaining sixty-eight active matters that we still showed after the end of the grace period got either this letter with their names in it, or the letter drafted in singular with the one particular matter they had pending in their district.

THE COURT: Or a letter like the June 10th letter?

THE WITNESS: They got the June 10th letter if venue appeared to be appropriate in their district for one of the hundred and three new referrals --

THE COURT: I see.

THE WITNESS: -- that the Service made on May 14th.

THE COURT: All right. Thank you.

MR. ROMERO: I will ask the Clerk to place government's Exhibits 25, 26B, 27B, 28B and 29B before the witness.

(Pg. 86, line 23 - pg. 87, line 18)

THE COURT: Very well.

(Said Exhibits before witness.)

BY MR. ROMERO:

Q Could you please identify Exhibit number 25,

A Exhibit number 25 was a teletype to all United States Attorneys which I drafted.

The teletype was for the signature of D. Lowell Jensen, Assistant Attorney General in charge of criminal division.

Q And was it issued?

A Yes, it was issued. It was -- excuse me.

It was sent to our people for transmission on June 15, 1982.

Q And what is the significance of this teletype?

A Well, the criminal division could spend its time in making decision, but we weren't about ready to let the United States Attorneys' Office have the same luxury.

(Pg. 87, line 19 - pg. 88, line 10)

What we were suggesting here was that there is a need to initiate prosecutions.

We are concerned because registration with Selective Service began nearly two years ago -- the grace period for late registrations expired -- that any significant delay in instituting prosecutions would impact adversely on the registration system and result, indeed, in increased numbers of alleged non-registrants.

Consequently, what we did was request the United States Attorneys to assign non-registrant matters to experienced Assistant U.S. Attorneys and insure that such matters were handled on a priority basis.

Then we asked that if the matters could be sufficiently investigated to warrant it that indictments should be returned before the end of June, 1982.

THE COURT: Mr. Kline, in the last

(Pg. 88, line 10 - pg. 89, line 2)

sentence of the first paragraph of the teletype in question here, when you say, "Our records reflect that approximately half of all districts should now have active non-registrant matters," you don't make reference to active prosecution policy as opposed to a passive one, I take it?

THE WITNESS: As I understand your question, your Honor, what this means -- in order -- If I need to communicate with an assistant for some reason or other, for example, when we shut down prosecutions, I needed to know the district the prosecutions were in so we can notify them, "Hey, don't go to indictment".

Consequently, I had and still have in my office reasonable accurate records reflecting where a particular non-registrant was sent.

What this sentence indicates is that my records showed that approximately fifty

(Pg. 89, lines 2 - 19)

districts had pending non-registrant matters. I'm sorry. You mean the active there?

THE COURT: Yes.

THE WITNESS: Simply pending things that were still active.

THE COURT: I see. But all based on the Passive Enforcement program of Selective Service.

THE WITNESS: Correct, your Honor.

THE COURT: All right.

BY MR. ROMERO:

Q I will ask you to identify Exhibit 26B.

A Exhibit number 26B is a memorandum which I drafted for the initialing or signature of D. Lowell Jensen to the Attorney General concerning prosecutions of Selective Service non-registrants.

It is dated June 29, 1982.

Q And what is the significance of this memorandum?

(Pg. 89, line 20 - pg. 90, line 12)

A Well, I learned on June 28 that the first indictment of an alleged Selective Service non-registrant was to be returned on June 30th, or at least we hoped it would be.

The Department then decided to try to find out what was going on. And I was asked to create a memorandum, essentially a briefing memorandum on kind of a broad overview of what was heppening in Selective Service non-registering cases.

This is the result. This is the memorandum which I drafted.

Q Now, directing your attention to page two of that memorandum, under category two, present prosecutive policy, the second and last paragraph, could you read that first sentence.

A This is a discussion of the present prosecutive policy. And the first sentence says:

(Pg. 90, line 13 - pg. 91, line 7)

"Our policy is designed to ensure that, one, the refusal to register is willful and, two, only persons who are the most adamant in their refusal to register will be prosecuted."

Q Could you explain that policy statement.

MR. ROSENBAUM: I am going to object to that, your Honor, on foundation grounds.

This matter was signed and authorized by Mr. Jensen. And u less the foundation is established that Mr. Kline communicated his intent to Mr. Jensen and Mr. Jensen specifically adopted that intent, then Mr. Kline's intent is irrelevant.

THE COURT: All right. It is overruled. You may go into it further on cross-examination, however.

You may respond.

THE WITNESS: I'm sorry. Would you repeat

(Pg. 91, lines 7 - 25)

the question.

THE COURT: All right. Let's have the last question read back, please, Ms. Ferrier.

(Record read.)

THE WITNESS: Oh, yes. This is simply a reflection on the former paragraph.

I note -- I note -- I noted in the memorandum which was sent to the Attorney General that our policy requires that United States Attorneys notify non-registrants and inform them unless they register that prosecution will be considered.

And, in addition, I noted that in most if not all instances we anticipate that a Federal Bureau of Investigation agent would at least -- No.

We anticipate that the Federal Bureau of Investigation will also interview alleged non-registrants.

I guess, to be perfectly accurate, I should properly say at least attempt to

(Pg. 91, line 25 - pg. 92, line 17)

interview the alleged non-registrant.

Q Is that a reformulation of your beg policy that you referred to?

A It is. What I am trying to suggest here is that the same sentence that I read concerning most adamant people in the non-registrant being willful is nothing more than a simple statement of what the end result of the beg policy is.

If you are begged to register and you don't do it your refusal to register is willful. If you are begged to register and don't do it, then you must be a person who is most adamant in your refusal to register.

Q Do you know the purpose behind having this beg element in the prosecutive policy?

A The purpose is reflected in this memorandum, the second paragraph, the sentence that I read.

(Pg. 92, line 18 - pg. 93, line 10)

Q I ask you to identify Exhibit 27B.

A Exhibit 27B is a letter which I drafted to a United States Attorney for my own signature concerning alleged Selective Service counseling violations.

Q And can you please explain the significance of your writing this letter to the U.S. Attorney?

A Okay. This was a letter that was sent on July 7, 1982 to the United States Attorney.

The United States Attorney, pursuant to our counseling policy, that is, that "you need our authorization before you prosecute people for counseling for refusal to register" came in and asked for our authorization. I denied it.

Q Did you have any special concern in a case such as the one proposed by this United States Attorney, any special concerns?

A Well, the concerns, of course, are

(Pg. 93, lines 10 - 23)

the same focuses on all counseling violators. And that is the First Amendment issues that are naturally going to be raised in such a case.

I wanted to avoid the First Amendment issues. The important thing now is to establish that the government thinks that non-registration is itself a serious offense, that non-registration is serious.

What I wanted the United States Attorney to do was to bring prosecutions of non-registrants in his district in the event that he still, perhaps, at a subsequent date wishes to go against the alleged counselor, that he then come in and ask, again, for our authorization.

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(Pg. 97, line 21)

Kline - Direct by Mr. Romero

Q I would like you to identify Exhibit 31B.

(Pg. 97, line 22 - pg. 98, line 13)

A This is a letter which I drafted for the signature of Lawrence Lippe to United States Attorney concerning alleged Selective Service non-registrant.

Q And what was your purpose in drafting this?

A I'm sorry. It was also sent August 6th, 1982.

My purpose was that this United States Attorney came in, and he wanted to decline this particular alleged non-registrant.

He wanted us to suggest or deal with this person as if he had been constructively registered.

And the United States Attorney also raised the issue that this person appeared to be a religious objector.

Q And what was the essence of the policy statement contained in this letter?

A Well, I essentially went through

(Pg. 98, lines 13 - 24)

the difficulties with trying to liberally construe constructive registration.

I also highlighted the difficulties with trying to decline cases against people because they refused to register allegedly for religious purposes, and I concluded that neither of these two grounds would have been sufficient to authorize a declination.

And consequently, I directed him -- I told him that we -- I told him in the letter drafted for Larry Lippe's signature that we did not authorize a declination of such person.

• • •

(Pq. 99, line 17 - 25)

Kline - Direct by Mr. Romero

Q I ask you to identify Exhibit 33.

A Government's Exhibit number 33 is a copy of a letter which I received from Edward A. Frankle, addressed to Lawrence Lippe, Chief general litigation legal advice

(Pg. 99, line 21 - pg. 100, line 14)

section.

And it is dated September 8th, 1982. I received this copy and the original when Mr. Frankle brought in the latest batch or latest number of referrals into my office, on September 8, 1982.

Q And what did you do with his latest referrals?

A Well, the referral -- this letter was for fifty-five new referrals.

I handled these fifty-five new referrals the same way that I have handled all the other referrals; that is I reviewed them, I tried to determine whether or not the people were within the class of people who must register but need not -- strike that -- who must register and have not.

And such people I then referred to the appropriate United States Attorneys' Offices and to the Federal Bureau of Investigation.

• • •

(Pg. 103, lines 1 - 16)

It is dated, meaning it was initialed by me, on September 30, 1982.

Q Just to sum up, in your handling of the case involving David Alan Wayte, was that case handled in any special way, out of the ordinary?

A His case, you know, except, of course, for the referral to your district, because that's where venue lay, was handled no differently. It was not singled out and handled any differently from any other person, which my review indicated that such person allegedly might be within the class of people who must register and had not done so.

Q And why is the reason or what is the reason why you referred Mr. Wayte's case to the U.S. Attorney's Office for the Central District for prosecution?

(Pg. 103, line 17 - pg. 104, line 8)

A He appeared to violated the law.

He appeared not to have registered, and it appeared that venue was proper in your district.

Therefore, I sent his name initially to your district. Therefore, I re-referred his name after the grace period ended to your district.

MR. ROMERO: Your Honor, at this time I would ask for the admission into evidence of the remaining exhibits, which are 15B, 16B, 17B, 18B, 19, 20B, 21, 22B, 23, 24B, 25, 25B, 27B, 28B, 29B, 30B, 31B, 32B, 33, 34B, 35B and 36.

THE COURT: There being no objection, they will be received.

(Said documents marked plaintiff's Exhibits 15B, 16B, 17B, 18B, 19, 20B, 21, 22B, 23, 24B, 25, 25B, 27B, 28B, 29B, 30B, 31B, 32B, 33, 34B, 35B and 36 for identification were received in evidence.)

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(Pg. 108, lines 1-2)

LOS ANGELES, CALIFORNIA, THURSDAY, OCTOBER 7, 1982, 1:30 P.M.

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(Pg. 108, line 17 - pg. 109, line 5)

CROSS-EXAMINATION

BY MR. ROSENBAUM:

Q Mr. Kline, you testified this morning regarding certain policies of the Justice Department with respect to investigation and prosecution of young men referred to the Department by Selective Service; is that generally what you were talking about?

A Yes.

Q And I take it, sir, that the Justice Department had no involvement in the determination of which young men would in fact be referred by the Service to the Department for investigation and prosecution; is that correct?

(Pg. 109, lines 6 - 22)

A That's not so easy a question to answer. Had in my meetings with Mr. Frankle, had I been exceedingly disturbed by what he told me, I would have taken whatever steps I thought necessary in order to correct whatever the problem was, but as things worked out -- I think the answer to your question is no.

Q I see, but the actual men, the names of the men who were referred to the Justice Department, they came from the Selective Service; is that right?

A That is correct. I should hasten to add though that if a non-registrant is brought to my attention either by writing to the Department of Justice or through an FBI report or something of that nature, I do not hesitate to refer that name to Selective Service to put into the program to see if the person would register with a letter to Selective Service and if he meets

(Pg. 109, line 22 - pg. 110, line 14)

the criteria that the Service has, the Service refers that person to us, the criteria being that he appears to be within the class of people that must register and does not do so.

THE COURT: But, Mr. Kline, are you saying that there is some directive, either written or unwritten, that if the Justice Department refers the name to Selective Service -- of course, the individual meeting the parameters would have to submit that name back to Justice--or who makes that decision?

THE WITNESS: That decision is made by Selective Service. We refer the people over for determination whether or not the person -- if it appears that the person is within the class and hasn't registered from the information we have, we refer the person over to the Service so they can check their records to find out if he has indeed failed

(Pg. 110, lines 14 - 25)

to register. In the event he has failed to register and they have a sufficient address, they will put the person into this program.

THE COURT: As a matter of meeting their own policy guidelines?

THE WITNESS: Yes. And the understanding that we have at least a working level between agencies.

BY MR. ROSENBAUM:

Q Yes. And to follow Judge Hatter's questions, the decision whether or not to make referrals, that rests with Selective Service: isn't that right.

A Yes.

• • •

(Pg. 114, lines 7 - 20)

Kline - Cross by Mr. Rosenbaum

Q Mr. Kline, understanding that the Passive Enforcement System was concerned with persons who reported themselves or persons who reported third parties, when did you first learn of the existence of that system?

A The question is not so easily answered, and the reason being at least as I understand it, the Service was receiving letters. Obviously, people were writing in or they were being referred by other agencies saying that they weren't going to register. The letters kind of lay around for a bit and the Service then said, "What do we do with them?" Well, what we do with them is notify them and at least there are discussions going on between agencies. I'm not saying I want everyone tonight. But the

(Pg. 114, line 20 - pg. 115, line 12)

upshot is the Passive System is just kind of a name that was tagged onto something that was built up inside the system. I mean, it's too easy to assign too much importance to something called the Passive Enforcement System.

Just means that they receive names of people who allegedly are not registered, and somehow, somewhere along the line, probably Ed Frankle tagged the name Passive Enforcement System. I really can't answer your question other than to say that at least by May 26th I knew that they had names and they intended to refer names over to us. Whether or not we called it the Passive Enforcement System at that time, I couldn't tell you.

Q Those would be the people who Selective Service would be focusing upon, persons who reported themselves or reported by third parties; is that right?

(Pg. 115, line 13 - pg. 116, line 7)

A Well, when you say focusing, the Service at the time had no other way to identify non-registrants other than people who were simply brought to its attention.

Q That would be your conclusion.

THE COURT: But is that answer "Yes"? These were the people?

THE WITNESS: If by focusing, we can say that they're the only people then, yes, your Honor, the answer would be yes.

BY MR. ROSENBAUM:

Q In fact, Mr. Kline, to this date, the only persons who have been prosecuted by the government are persons who have been identified by the Passive Enforcement System; isn't that correct?

A Yes.

Q Now, Mr. Kline, you also testified at some length this morning regarding procedures with which the Justice Department followed concerning notifications of

(Pg. 116, lines 7 - 25)

suspected non-registrants to afford them the opportunity to register late; is that right?

A Yes.

Q You refer to that as the Beg system; is that right?

A The Beg policy.

Q The Beg policy, yes. And the warning letters that you discussed, they were the real implementation of this Beg policy?

A I'm sorry, which one of the letters?

Q The letters that would go out to individuals and say, "We don't have a record of your registration, and if you don't register, you could be prosecuted."

A Well, there are two letters. There is a letter from Selective Service system assuming that there is no sufficient address, a referral to us. And then a letter from the United States Attorney to such person.

Q And those are the warning letters that constitute the Beg system, the actual

(Pg. 116, line 25 - pg. 117, line 19)

implementation of the Beg system?

A As I would describe it, yes, those are the warning letters, although the Beg policy is a little more than that. The Beg policy is: "We ask you to register, and if you register any time before indictment, we do not prosecute you."

Q Now, is the Justice Department policy, sir, to have these letters sent to persons irrespective of how they're identified as non-registrants?

A If they're people who have passed through Selective Service to my office to the United States Attorney's Office, yes.

Q So for example, warning letters would be sent to young men who had been identified as suspected non-registrants, as the rule of the Passive Enforcement System; isn't that right?

A Yes.

Q And I take it, sir, that with respect

(Pg. 117, line 19 - pg. 118, line 12)

to an Active Enforcement System, warning letters would also be sent to suspected non-registrants whether or not identified in that regard?

A Your question again is not easy to answer, and the reason being that we are -- I perceive any way of -- prosecuting policy, it being a dynamic process. In the event that some kind of circumstance changes, in the event that, for example, my disclosure of the beg policy which had been in San Diego somehow injures the registration scheme, we might very well decide to change the policy unless the policy is changed, of course.

Anyone who was referred to the Department of Justice for prosecution would receive a letter prior to his indictment.

Q That's the way the system works at the present time; isn't that right?

A That's the way it works at the

(Pg. 118, line 12, - pg. 119, line 3)

present time.

Q So whether you're identified by the Active Enforcement System or the Passive Enforcement System, at the present time, you're going to get a warning letter; is that right?

MR. ROMERO: Objection, your Honor. The attorney should allow the witness to answer the question.

THE COURT: Wait until the question is fully formulated before attempting to respond. The reporter can't take you both down at the same time.

THE WITNESS: I'm sorry, your Honor. I wanted to be as precise as possible.

You know, we have had indictments now where we can't find the non-registrant, and it appeared essentially he was trying to avoid us. That person did not receive a letter. There are of course instances based upon --

(Pg. 119, lines 4 - 14)

THE COURT: Excuse me, was such a letter sent out to the last known address?

THE WITNESS: Yes.

BY MR. ROSENBAUM:

Q Now, it's true, isn't it, Mr. Kline, that the only young men who have been prosecuted by the Justice Department to this date are young men who received warning letters after being identified as a result of the Passive Enforcement System; isn't that true?

A So far as we know with the one possible exception that I'm raising right now.

• • •

(Pg. 120, line 22 -

Kline - Cross by Mr. Rosenbaum

Q Now, Mr. Kline, in respect to your duties and responsibilities concerning draft non-registration, you testified this morning that you've had the occasion to work with individuals within the FBI; isn't that right?

(Pg. 121, lines 2 - 14)

A Individuals within the FBI, yes.

Q You worked with Mr. McNabb?

A Yes.

• • •

(Pg. 126, line 14 - Pg. 127, line 2)

Kline - Cross by Mr. Rosenbaum

Q Now, Mr. Kline, on any occasion from the time that you were referred to, assigned responsibilities for draft non-registration, did you ever ask Mr. McNabb if the FBI would assist in the apprehension of non-registrants not identified by the Passive Enforcement System?

A Can I ask for a clarification? Do you mean if I asked McNabb if we would develop our own Active Enforcement System?

Q No. My first question is: Did you ever say to McNabb, "We're getting the names of persons with respect to the Passive Enforcement System, and after I make a review, I'm giving them to you and your office."

(Pg. 127, lines 3 - 21)

With the exception of those persons, did you ever ask Mr. McNabb if the FBI would assist in apprehending non-registrants who weren't identified by the Passive Enforcement System?

A No, but if we develop some kind of system, I would expect Mr. McNabb to assist in precisely the same thing that you're suggesting. If there is some kind of Active Enforcement System I would expect the FBI to assist us, yes.

Q But the answer to my question is "No"; isn't that right?

A The only reason that I'm hesitating is because we've had plenty of discussion of what happens if we get overwhelmed with numbers of referrals. How much effort will the FBI put into it, the Department of Justice? Are they seeking extra funds in order to bolster their own efforts? All that implies that there is something other than a Passive Enforcement System as we know it.

(Pg. 127, line 21 - pg. 128, line 13)

I've never sat down and said precisely those words, "Would you assist me in apprehending people identified pursuant to a system other than the Passive system?"

THE COURT: I think that answers the question.

BY MR. ROSENBAUM:

Q And I take from you, Mr. Kline, you've never received a direction from any of your superiors not to make that request of Mr. McNabb?

A That is correct.

Q Do you know if anyone within the Selective Service Department has ever asked Mr. McNabb to apprehend suspected non-registrants not identified by the Passive Encorcement System?

A I know of no such communication. And if it were made, I would expect to be notified of it.

Q Now, Mr. Kline, in regard to an order

(Pg. 128, line 14 - pg. 129, line 7)

by Judge Matter, did you have cause to have a search made of your office files regarding the status of individuals identified as suspected non-registrants from the Passive Enforcement System? I'll be a little bit more specific. Persons who were identified themselves as self-reporters and those identified by third parties.

A Yes, after Judge Matter entered his order on Friday, I -- yes, in any event, I dialed back to my office as soon as I could. In fact, I reached a supervisor at home to discuss a number of matters and one of those matters was obtaining the breakdown of files in my office.

Q Did you obtain that breakdown?

A Yes. If I could, though, I thought I could get the information from Selective Service. It turned out they didn't have the information. I then asked one of my supervisors to put somebody on going through the

(Pg. 129, line 7 - pg. 130, line 2)

files in my office even though I knew we couldn't work it out a hundred percent. Precisely, who is self-reported and who was not, to give me the best information that we had.

Turns out that in one place, the best information of that sort can be obtained from my fies, and yes, I did obtain ultimately the information from my secretary.

Q And do you have those results here in the courtroom?

A I don't have them with me. Perhaps Mr. Romero does.

THE COURT: Mr. Romero, do you have them?

MR. ROMERO: Yes, your Honor.

MR. KLINE: Could they be made available to the witness?

THE COURT: Why don't you present them to the Clerk?

(Mr. Romero hands paper to Clerk.)

(Clerk hands paper to Court.)

(Pg. 130, lines 3 - 21)

THE COURT: These are notes that you've taken down based on a telephonic conversation with your secretary?

THE WITNESS: If I may see them, I can tell you, your Honor.

THE COURT: All right, fine.

THE WITNESS: Yes, they are.

THE COURT: All right.

BY MR. ROSENBAUM:

Q And could you share with the Court what the results of that search were?

A Okay. The result of her, and as I understand it, another secretary going through my files, and there are several problems with these numbers, but I'll give you what she gave me. One hundred forty-six self-reported. That's after correcting for one extra matter that she gave me. It turns out that she counted one file twice that I knew about. For other reported, she came up with one hundred ninety-seven incomplete

(Pg. 130, line 22 - pg. 131, line 14)

files, that is ones in which she couldn't tell: twenty-four. Of these self-reportings after investigation, we learned that eleven were too old. They weren't within the registration class period. Eleven had registered. Eleven were women. One was fictitious, two we had insufficient addresses on to predicate an investigation. And two, according to my notes, were not within the class which probably means they were too old. Of the other that included thirty-five persons who appeared to be illegal aliens, who might no longer be within the United States. Eighty-three of the others had registered. One apparently was not within the class.

One the Bureau was unable to locate. Eleven were too old. I believe that nine were apparently fictitious and three persons had enlisted. The problems are if you add all these numbers up, you come up with three hundred fifty-seven files, and the problem

(Pg. 140, lines 14 - 23)

is I have only been referred three hundred forty-one total files from Selective Service. So that means apparently I have some duplicative files, and she counted some files twice.

Q And with the exception of that, though, you regard these numers as reasonably accurate? based on the files?

A My secretary did it as humanly accurate as could possibly be done.

• • •

(Pg. 141, lines 14 - 25)

Q And in fact, Mr. Kline, you never asked an agent of the FBI to go out and develop information about non-registrants not identified as a result of the Passive Enforcement System; isn't that true?

A I have never done so, that is indeed correct.

Q To your knowledge, no one in the Justice Department has?

A If that includes United States

(Pg. 141, line 21 - pg. 142, line 14)

Attorneys' offices I was told of one time when a Bureau agent went out and conducted an interview before bringing it to -- surely to my attention or to Selective Service's attention. I don't know whether the agent contacted the United States Attorney's Office or not, but with that one exception, I know of no other instance. I'm sorry. I do know of two instances, apparently where the Bureau did ask applicants whether or not they did register.

Q But with those exceptions, sir, the answer is really "No"; isn't that right?

A None other appear to me immediately at the moment.

Q And you don't know of any examples with respect to Selective Service making that?

A No.

Q And that sort of information would come to your attention in the formal course

(Pg. 142, lines 14 - 15)

of business?

A I would surely hope so.

• • •

(Pg. 143, lines 2 - 17)

Kline - Cross by Mr. Rosenbaum

Q And this is one of the documents you discussed with Mr. Romero this morning?

A That is correct.

Q Now, you didn't read every portion of that memo this morning, did you?

A You are correct.

Q And I wonder, Mr. Kline, if you could please direct your attention to the fourth paragraph of that document. Do you have that in front of you?

A Yes, I do.

Q And could you please read the first three sentences?

A "Selective Service is still exploring ways to develop an quote 'Active' en quote

(Pg. 143, line 18 - pg. 144, line 16)

Enforcement System. It prefers obtaining access to social security records. Footnote.

"And comparing such records with its registration list, we cannot predict, however either the form or fairness of the ultimate Selective Service program" --

Q That's fine.

Could you read the reference footnote, please?

A "There is a provision in a defense appropriations bill to give Selective -- strike that -- to give this Service access to social security records. Apparently, the administration has not yet decided whether or not to support such an enforcement program."

(Pg. 144, lines 17 - 18)

Q And you, of course, are the author of that footnote?

A That is correct.

• • •

(Pg. 146, lines 15-18)

Kline - Cross by Mr. Rosenbaum

Q Well, now, Mr. Kline, you from the very beginning have been very concerned that an Active Enforcement System be developed?

A Yes.

• • •

(Pg. 147, lines 3 - 10)

Q Mr. Kline, when you began work on the draft registration system, Mr. Carter was the President; isn't that correct?

A When it was assigned to me and when I would have made the initial contacts, yes.

Q And you were aware of the Presidential election between Mr. Carter and Mr. Reagan during the period of time leading up to November 1980?

(Pg. 147, line 11 - pg. 148, line 5)

A Yes.

Q And you were aware that one of the issues in that campaign concerned the positions of the candidates with respect to the draft?

A Yes.

Q And you were aware of Mr. Reagan's position, were you not?

A I'm sure that I was

Q And what was your understanding of Mr. Reagan's position?

A As I understand it now, certainly from reading things that have appeared in the press --

Q No. I want your understanding to the best of your recollection, what your understanding was at that time.

A To the best that I can testify to the question of what I knew at that time, meaning before the election, it would be that now President Reagan opposed mandatory

(Pg. 148, lines 5 - 22)

registration with Selective Service.

Q Well, you understood, Mr. Kline, I take it that you were keenly interested in that issue as it developed during the campaign, weren't you?

A I was not particularly keenly absolute on the issue until I had to start worrying about referrals being made to us.

Q I see.

A If you note my memorandum to Mr. Juliani doesn't mention any prior position that the President might have taken. At the time, it was based upon something that allegedly had been reported that he allegedly had said to the President he wishes to continue with a voluntary military.

Q Well, Mr. Kline, thinking back to that period, you were aware that Mr. Reagan had vigorously campaigned against the draft, referring to it as one of the great moral questions of the day. Isn't that right?

(Pg. 148, line 23 - pg. 149, line 16)

A Reasonably certain that I must have known it at the time.

Q And in fact at the time you wrote the Juliani memo, you were concerned, were you not, about the consequences of an aggressive investigation policy as it might be perceived contrary to administration policy; isn't that right?

A Of an aggressive?

Q Aggressive enforcement policy.

A I was concerned that any steps by the Department of Justice in an investigative nature, of a prosecutive nature, might be conceived as inconsistent. Forget the aggressive part.

Q And, Mr. Kline, during this period of time, you were also aware that there were considerable in-fighting within the White House as to support for a draft registration program; isn't that true?

A What period of time?

(Pg. 149, line 17 - pg. 150, line 10)

Q Period of time in which this -- just preceding the writing of the July 6th, 1981 memo.

MR. ROMERO: Objection, your Honor. The competency of the witness testifying to in-fighting of the White House.

THE COURT: Overruled.

Ask him if he has knowledge. If he has no such knowledge, he can say so.

THE WITNESS: As best I can recollect, I became aware of the in-fighting, but not so to speak I became aware that there apparently were people in a policy position in the White House who opposed it, but that was not at this time period. The answer to your question as best as I can put together now would be "No". When I became aware of it, was at about the time of when we shut down prosecutions on or about December 9th, and there would then appear not as a result of our shutting it down, but there were at

(Pg. 150, lines 10 - 17)

that time articles in the press where apparently certain people in the White House were suggesting that there would be no registration system.

That is when I became aware that there appeared to be some dissent in the White House. At this time, I have no recollection whatsoever of knowing about this in-fighting that you're talking about.

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(Pg. 157, lines 5 - 12)

Kline - Cross by Mr. Rosenbaum

Q You've read the memorandum from Mr. Puscheck"

A I'm sorry?

Q The draft memorandum that you just referenced.

A I wouldn't have been able to comment without having read it of course.

Q Now, Mr. Kline, let me ask you a few questions first about 148 before we get

(Pg. 157, line 12 - pg. 158, line 5)

into some of the particulars. The notes at the back of 14B, you indicated those were in your handwriting?

A That is correct.

Q And what did those notes reflect?

A They reflect conversation that I had with my principal Deputy Chief, James S. Reynolds.

Q And what you wrote down there, were those Mr. Reynolds' comments?

A They were his comments made during a telephone call to me over a way that I should redraft the letter. Now if you see right at the top, it says D. Lowell Jensen. There must have been some conversation between someone and Mr. Jensen, and Mr. Reynolds was relaying at least a portion of Mr. Jensen's difficulties with that letter.

Q That was your understanding at the time?

A Yes.

(Pg. 158, lines 6 - 22)

Q Now, I want to see if I understand very carefully what your statements are with respect to this letter. As I understand your testimony this morning, you indicated this is something of an embarrassment; is that right?

A No, not truly as an embarrassment.

Taking that one sentence and throwing it at me in the middle of a Selective prosecution hearing without essentially the sentence being in context does seem somewhat troublesome to me, yes. In reading context, if you understand that I want an active enforcement system and I was trying to push to the extent that I could push whomever it is that needs to make the decisions that way, I'm not embarrassed by it at all. In fact, I'm somewhat proud of my literacy.

Q Your pride here comes from the fact that you regard what this letter was, was

(Pg. 158, line 22 - pg. 159, line 16)

an effort to prod to do what was fair and honorable; is that right?

A As I envisioned it, yes.

Q To make certain that an active enforcement system would in fact be placed into operation?

A Not--to the extent that I could influence that decision, yes.

Q And that was a response to Mr. Puschek's memorandum; is that correct?

A That is correct.

Q This letter was your answer to that memorandum?

A Well, when you say "answer", it was a memorandum that I somehow or other got ahold of, and I wanted to comment on. As I recollect, Mr. Frankle said that he would like to have criminal provision comments if they could be forthcoming.

Q This letter was part of your strategy to do the appropriate prodding as you saw fit?

(Pg. 159, line 16 - pg. 160, line 9)

A Yes.

MR. ROSENBAUM: Your Honor, could we have marked as defendant's Exhibit E, a copy of a seventeen-page document entitled, "increasing Selective Service registrations compliance," February 17, 1982, and then there is handwritten at the top the name Herbert C. Puscheck.

THE COURT: Do you want to show that to Mr. Romero?

MR. ROSENBAUM: Sure.

Again, it's my only copy, your Honor.

THE COURT: It will be marked as defendant's E for identification.

THE CLERK: Let's make it D as in David.

THE COURT: What do we have as C?

THE CLERK: That memo.

THE WITNESS: Your Honor, C I have as James Reynolds to Lawrence Lippe memorandum.

(Pg. 160, line 10 - pg. 161, line 4)

THE COURT: Thank you.

(Court looks at document.)

(Defendant's Exhibit D was marked for identification.)

(Said Exhibit before witness.)

(Witness looks at said Exhibit.)

THE WITNESS: I have glanced at the document.

BY MR. ROSENBAUM:

Q That is the document to which you drafted the response, the Puscheck letter response; is that correct?

A I believe so.

Q Now, directing your attention back Exhibit 149, would you turn to page four?

A I have page four.

Q And with the Court's indulgence, I know that you read a portion of this page this morning, but I would appreciate, sir, if you could read paragraphs one, three and four.

(Pg. 161, line 5 - pg. 162, line 3)

"There is an even more important objection to the present scheme that it wasts investigative resources. The present passive identification progran is liable to result in adverse judicial decision based on defendant claims of Selective prosecution.

"The objective of the efforts of both Selective Service and the Department of Justice is to encourage registration. The first few prosecutions if successful are likely to encourage other recalcitrant non-registrants to register. If, however, the first few prosecutions are not successful, compliance with the registration problem is liable to worsen

(Pg. 162, line 3 - pg. 167, line 3)

significantly. Consequently, it is imperative that the initial prosecution be successful."

Skipping the third paragraph --

Q Read the third paragraph, please.

A Third paragraph says:

"Unfortunately, we believe that if the government initiates prosecution with only the present passive identification scheme in place, there exists a real risk that the United States will lose at least a few of the initial cases. There is a high probability that persons who write to the Service and that persons who are reported by others are vocal proponents of non-registration. Since a passive identification scheme necessarily means that there will

(Pg. 163, lines 3 - 22)

be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of the local non-registrants will undoubtexly end to claims of the prosecution is based in retribution for the non-registrant's exercise of his First Amendment rights. See United States versus Falk, 479, F.2d 616, Seventeenth [sic] Circuit, 1973 en banc. Indeed with the present universe of hundreds of thousands of non-registrants, the chance that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning. In order to avoid the risk

(Pg. 163, line 22 - pg. 164, line 20)

of initial losses of non-registrant cases and the probable consequences of diminishing registration, we believe that Selective Service must create a program of active identification which will be functioning or well on the way to functioning at the time of the first non-registrant prosecution. The choice of enforcement scheme should be for the Service, but whatever scheme is ultimately implemented should be effective in identifying the preponderance of non-registrants without leaving substantial gaps."

Footnote three:

"Your memorandum suggested,

(Pg. 164, line 20 - pg. 165, line 17)

quote 'Some jurisdictions have privacy restrictions that could prevent use of their data', end quote. Memorandum at twelve. We would object to a scheme which was reasonably efficient and identify non-registrants for which are admitted non-registrants in an entire state or two, period."

Q Now, Mr. Kline, isn't it true that the comments on this page aren't just some lawyers' prod in response to the Puscheck memorandum but your genuine assessment of what the situation was legally under the passive enforcement system? It's a "Yes" or "No" question, Mr. Kline.

A The answer is yes --

Q In fact --

THE COURT: Let him finish.

A If you read it however, you determine

(Pg. 165, line 18 - pg. 166, line 10)

in the fourth paragraph that we are, at least I understand it, precisely in the situation where I say we're out of danger or difficulty. We have supposedly an active enforcement scheme and it's well on the way toward functioning in which case in theory if you accept this as a very good memorandum which I would like to think it is, we're perfectly okay. We're out of danger. We're good. This prosecution is good. And in theory -- I'm sorry, your Honor, I've got to phrase it this way: In theory, we shouldn't have the trouble with the courts that I suggest we might have in the former paragraphs.

THE COURT: All right, Mr. Kline, on the same line of questioning with regard to the third paragraph, and I guess once lightning strikes it can strike twice or more. Let me ask you about that. Why do you say that even given a passive enforcement program

(Pg. 166, line 11 - pg. 167, line 3)

that the likelihood a quiet non-registrant will be prosecuted is probably about the same that he would be struck by lightning if indeed your testimony is that the figures that you received from your very efficient secretary that there were at least one hundred ninety-seven individuals that were turned in by next door neighbors, unhappy girlfriends, or whatever, might be very, very quiet. Why wouldn't they then be prosecuted? Why would we have to wait for lightning?

THE WITNESS: I understand your question, your Honor.

The sentence is based on pure and simple logic. If I'm a person who must register and I do not go to the post office and tell no one, including friends, neighbors, parents, whomever, and if I do not write to the Service, which are the two ways of course, and the Service learns of people

(Pg. 167, lines 3 - 19)

who are not registered, how then could this person get into the passive enforcement system?

THE COURT: Why not?

THE WITNESS: Well, if he hasn't told anyone, no one can report him, and if he hasn't written in to the Service, he is not self-reported.

THE COURT: Aren't there unhappy people out there that know when someone has reached age eighteen, the birthday, a male, and that individual is more than likely not registered quietly in the sense that he is not going out on the street corners or writing letters to the Service. Nevertheless, the family or friends know that individual is not registered. Why would that person not be included in the one hundred ninety-seven that you indicated were turned in?

THE WITNESS: But we do indeed have people

(Pg. 167, line 19 - pg. 168, line 12)

come in and say, "I suspect that Jimmy Jones is not registered." I have no easy answer to your question, your Honor. It would be simply that that person in theory must have somehow or other signaled that he was not one of the ninety-three percent who is registered, but he is one of the seven percent who is not registered. And I'm sorry if it's unclear. It seems to me that he is less than quiet. I was thinking of someone who acted as the ninety-seven percent who register do act that gives no signals that he is not one of the ninety-seven percent who do register. He does not write in and he tells no one. That particular person, except by the sheer stroke of luck of someone's mere suspicion, cannot bet into the passive enforcement system.

THE COURT: Or someone that says, "Oh, yes, I've registered," and he's never asked.

THE WITNESS: In that case, it would

(Pg. 168, line 12 - pg. 169, line 6)

come close, it seems to me. No. To the extent that someone says this may be a person that wrote in and turned out to be a person -- it seems to me it's close to lightning striking.

BY MR. ROSENBAUM:

Q In fact, Mr. Kline, it was the perception of the Department, was it not, that the persons who would be turned in by third parties are vocal individuals who had made their opposition to the draft public?

A Once again, this is kind of a matter of logic. Now, when you say vocal, at least vocal to the extent of telling some third party, yes.

Q Mr. Kline, it is more than that.

THE COURT: Let's not comment now. He's answered that question.

BY MR. ROSENBAUM:

Q Could we have Exhibits 28B and 29B placed in front of the witness?

(Pg. 169, line 7 - pg. 170, line 4)

THE COURT: Yes.

THE WITNESS: I'm sorry? That's 28 and 29.

THE COURT: "B".

MR. ROSENBAUM: "B".

THE COURT: 28B and 29B.

THE WITNESS: I have 28B and 29B.

BY MR. ROSENBAUM:

Q And directing your attention, sir, to 28B, do you see a phrase in there about thorny selective prosecution?

A Yes, on page two.

Q And could you read the paragraph in which that sentence appears?

A "Selective Service's enforcement program is presently 'passive'. Non-registrants are brought to the Service's Attention either when they report themselves or when others report them. Consequently, the

(Pg. 170, line 4 - pg. 171, line 2)

first prosecutions are liable to consist of a large sample of (1) persons who object on moral or religious grounds and (2) persons who publicly refuse to register. The former are liable to be sympathetic defendants; the latter are liable to raise thorny selective prosecution claims."

Q So in fact, it was the Justice's position that the persons reported by third parties would be persons who had publicly come to the attention of those third parties?

A No. The word there is consistent. A large sample of, yes, I did expect some. I don't necessarily now. I didn't necessarily then expect they all might be. I don't know whether they are as a matter of fact.

Q But the answer to my question is that you did consider that a large sample

(Pg. 171, lines 2 - 4)

at minimum would be?

A A sample and a large sample, yes, might very well consist of such people.

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(Pg. 173, line 13 - Pg. 174, line 2)

Kline - Cross by Mr. Rosenbaum

Q So Mr. Puscheck didn't have to be prodded to support an active enforcement system; isn't that true?

A That's correct.

Q Nor, Mr. Kline, you have been concerned for some time about the fact that use of the passive enforcement system might prevent thorny selective prosecution problems; isn't that right?

A Yes.

Q And that's reflected in Exhibit 28B?

A Yes.

Q And Exhibit 29B

A Yes.

Q And Exhibit 26B

(Pg. 174, lines 2 - 23)

A I'm sorry. 268?

Q Yes, sir.

A Yes.

Q And Exhibit 168?

I direct your attention to a phrase in there referring to passive legal problems.

A I don't use the word thorny in that particular memorandum as I did on the others which were practically verbatim reproductions. But in that particular memorandum, I do say that:

"Prosecution of a vocal non-registrant will undoubtedly result in allegations if the prosecution is brought in retribution for the non-registrant's exercise of his First Amendment rights."

Q Now, Mr. Kline, you became concerned about the issue of Selective Service prosecutions almost immediately after your assignment,

(Pg. 174, line 23 - Pg. 175, line 16)

isn't that true? "Yes" or "No".

A I'm trying to place the time. The answer is yes. Whenever you have a universe of non-registrants -- strike that -- a universe of federal law violators which is much larger than the person you prosecute and you somehow one way or the other get someone who can raise a First Amendment type claim, I anticipate Selective prosecution or at least Selective prosecution claims.

Q And, Mr. Kline, isn't it true that about the time that you received this assignment, you were very concerned that Selective Service in fact be as close to implementing an active system as possible?

A At what time?

Q At the time the first prosecutions go forward.

A At the earliest meetings as I can recall, yes, I was very concerned that the

(Pg. 175, line 16 - pg. 176, line 9)

Service be as close as they could to actively seeking out non-registrants, yes.

Q There hadn't been a single person in this country prosecuted under an active enforcement system at this time, isn't that true?

A The only reason I'm somewhat hesitant, I'm familiar with a number of the cases which I have gone through before indictments were brought. I'm not familiar with all of the cases and the background. I don't believe, for example, that there was anyone who was prosecuted because the FBI somehow or other stumbled across the person and then referred him to the Service. But in any event, everyone came from the Service when letters were sent and everyone came from the Service either by being reported by third parties, perhaps the FBI or whom are self-reported.

Q You're aware of an active enforcement

(Pg. 176, line 10 - pg. 177, line 3)

system that uses social security files and IRS files?

A Yes.

Q And no one has been prosecuted under that system has there?

A That is indeed correct.

Q And in fact, sir, there hadn't been a required non-registrant prosecuted, quiet non-registrant prosecuted yet?

A There have been two prosecutions which I do not know frankly whether or not those people fall within the category of being quiet as opposed to being publicly vocal.

Q But --

A I have not sat down and checked everyone's 302's on the people. There are two prosecutions that come immediately to mind which might very well have been quiet people.

Q But of the ones that you're

(Pg. 177, lines 3 - 16)

specifically aware, sir, you're not aware of any quiet non-registrants being prosecuted, isn't that true?

A If I were to speak in terms of probabilities, I believe that those two probably were before they were prosecuted quite quiet.

Q I'm asking you of your knowledge, sir.

A To the best of my knowledge, I'm responding.

THE COURT: It sounds like he's answered that question.

And with regard to the last answer, are you suggesting that once these two individuals that you've singled out were prosecuted, they were something less than quiet? Or something more than quiet?

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(Pg. 178, lines 12 - 13)

REDIRECT EXAMINATION

BY MR. ROMERO:

(Pg. 178, line 14 - pg. 179, line 6)

Q Mr. Kline, as evidenced by the memorandum that defense counsel went over with you, you were sensitive to the issue of the claims of Selective prosecution being raised and prosecutions brought forward under the passive enforcement system; correct?

A Yes. I am not the highest person in the United States Department of Justice. I feel an obligation to call to tell my superiors the way that I see things. I frankly anticipated Selective prosecution hearing, and my memos bear me out on that. I was very concerned about them. My memos bear me out on that. I wanted the government to appear as fair and as honorable and just as Dave Kline could make it appear any way, and I wanted as much as possible an active enforcement scheme in place or nearly in place at the time of the first prosecution. That's what my memos reflect. They reflect a subordinate trying to tell my superiors what

(Pg. 179, lines 6 - 23)

to expect, what might happen in these kinds of cases.

Q Now in your opinion, has the passive enforcement program ever been constitutionally defective because it singles out the prosecution of those who have vocally and publicly opposed draft registration?

A If it were my opinion that the passive enforcement system as it's become known were constitutionally defective, you would be reading memorandum which said I believe it's constitutionally defective. Shut it down. Don't go forward with it. I don't believe it is. In my opinion, it is quite constitutional. I don't see it any different frankly from prosecuting people who confess to any other crime. It does not give people immunity.

Q Also in your opinion, has the active enforcement plan progressed to such a stage that you feel comfortable that your

(Pg. 179, line 23 - pg. 180, line 16)

recommendations that Selective prosecution claims are not as sound as they otherwise would be because this active enforcement plan is far enough along?

A Well, the reason -- the active enforcement scheme shows, it seems to me, that the government is acting in ultimate good faith. It wants all people if it can possibly get them. Assuming that you identify vast numbers of people pursuant to Selective -- strike that -- social security records, then you've got all people treated equally. That's what I want. And then, we create some kind of perfectly permissible selection criteria. My memo shows, and I still think now that probably that selection criteria or criterion would be one based upon randomness, in which case no one can possibly accuse us as we have been accused of trying to silence dissenters, no one can accuse us of trying to single out persons with deep

(Pg. 180, line 16 - pg. 181, line 8)

religious or moral beliefs.

What we want are all people. What we want is all people treated precisely alike and what we want is a way that we can come in here to court and say, "Judge, the only reason this person was chosen was out of pure and simple randomness," assuming that we get someone. If we don't get someone, then we'll use some other kind of selective criteria. I've got to see what comes into my office before I can make a recommendation.

Q Based on all your contacts in your position as formulating policies for Selective Service prosecutions have you ever had any basis to make that anyone in the government purposely delayed an active enforcement program so that vocal protesters would be prosecuted under the passive enforcement program?

A I'm aware. It's been pointed out by

(Pg. 181, lines 9 - 25)

defense counsel that there has been objection to using things like a social security match program. My understanding though is that that in no way is related to anyone's thinking that we're going to silence dissenters by slowing down the active enforcement system. That is a political philosophical whatever perspective at least as I understand it. We don't want government becoming too powerful. We don't want government having access to all these files and all these people. Has absolutely nothing to do that I have ever heard anyone suggesting that we're not going to go ahead with a social security match in order to silence dissenters. In fact, that would be absolutely outrageous if anyone in government ever tried to suggest that within my presence.

Q And in your opinion, what is the feasibility of using FBI agents to identify non-registrants?

(Pg. 182, lines 2 - 20)

MR. ROSENBAUM: I will object to that on foundation grounds, because the witness has specifically testified that he never made any inquiry in this area whatsoever.

THE COURT: Just a minute. That's overruled. You may go ahead.

THE WITNESS: This is an area now that it comes to prosecution that we develop, we devote, I devote more and more fault to. The question is how do we use FBI agents if we wanted to create our own scheme. I guess maybe we could direct the FBI agents out in Tulsa, Oklahoma to go to the nearest high school and get that list and run it against the Selective Service list and maybe we pop out with some non-registrants. But I would find that repulsive, that we somehow or other go to a particular high school in a particular place and obtain these lists, and because of what the government has done, ended up with one particular district

(Pg. 182, line 20 - pg. 183, line 10)

prosecutor.

As best as I understand, if the social security match is done right, it has the potential for being about as fair, and until recently, I thought as perfect an enforcement system as can exist for any kind of federal crime. Why push for something less than perfect if we can have perfection down the line was the thing at the time.

Q And to your information, is that active enforcement program proceeding now with matching of social security numbers?

A It is proceeding, yes.

MR. ROMERO: Nothing further.

THE COURT: Any recross-examination?

MR. ROSENBAUM: Yes, just a bit.

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(Pg. 185, line 11)

Kline - Recross by Mr. Rosenbaum

Q Now, one final question. The

(Pg. 185, line 11 - pg. 186, line 4)

prosecutors of Mr. Wayte and the other individuals that are presently being prosecuted at this time to the best of your knowledge, that certainly wasn't the result of a random system as you were talking to Mr. Romero; isn't that correct?

A No randomness as I suggested, at that time of course was -- well, to Mr. Romero was as a result of our having a list and somehow or other going down the names, the fifth name, the twelfth name, the thousandth name or throwing a dart against the wall or somehow or other programming a computer to come up randomly with names.

Mr. Wayte is being prosecuted as a result of a system in which the government itself did not make the selections. It is the result of someone else' bringing, including possibly Mr. Wayte bringing himself to our attention.

Q And the use of no other system

(Pg. 186, lines 4 - 20)

beyond that system itself; isn't that correct, sir?

A No, it's not really correct because we have the beg policy. I mean he doesn't get really selective until he begs to register and he refuses to register.

THE COURT: Let me ask you this, Mr. Kline:

Is there anything about the passive enforcement system where Selective Service sends names to the Justice Department that would prevent the Justice Department from using randomness now?

THE WITNESS: There is no reason, perhaps other than the small amount of number that would preclude our using randomness.

THE COURT: Does a small amount of numbers prevent you from using randomness? If you have two numbers, can you not use randomness?

THE WITNESS: Yes, your Honor, we can.

(Pg. 186, lines 21 - 23)

THE COURT: All right. Thank you.

All right. If there are no further questions, we'll take a mid-afternoon recess.

• • •

(Pg. 187, line 24 - Pg. 188, line 12)

Romero - Cross by Mr. Rosenbaum

Q Mr. Romero, how long have you been a prosecutor in the U.S. Attorney's Office in Los Angeles?

A Approximately four and a half years.

Q And in the course of working on the Wayte case you've had an opportunity to work with the Federal Bureau of Investigation?

A Yes, correct.

Q And the gentleman here is the agent with whom you've had primary contact?

A Yes, Special Agent Ed Ochotorena.

Q And have you worked with any other agents?

A On the Wayte case?

Q Yes.

(Pg. 188, line 13 - pg. 189, line 8)

A I don't believe so, no.

Q And, sir, have you ever asked this agent to engage in any investigation to determine non-registrants within the Central District of California who had not been identified as a result of the passive enforcement system?

A No, I haven't.

Q Or to develop information with respect to such persons?

A No, I haven't.

Q To your knowledge, has anyone in the local U.S. Attorney's Office made any request to an FBI agent to that effect?

A No, not to my knowledge.

Q You indicated in your declaration that you received a total of thirteen cases from the Department of Justice.

A Correct. That was as of the time of writing that declaration. Since then, I have received about three or four other cases.

(Pg. 189, lines 8 - 25)

but I've been so busy on another matter, that I haven't been able to look at those files.

Q And those are all cases that came from Mr. Kline's office?

A Yes.

Q And those would all be individuals who had been identified as a result of the passive enforcement system; isn't that correct?

A As far as I know, yes.

Q Do you know of no cases in which individuals have been identified by any other system?

A No, I don't.

Q Or by a random system of identification?

A No, I don't.

Q Now, Mr. Romero, to your knowledge, how many non-registrants are there within the Central District of California?

(Pg. 190, lines 2 - 21)

A I have no idea.

Q Have you made any inquiry at all?

A That's a broad question. I'm sure I've asked people in casual conversation something about the numbers involved, but I haven't made any official inquiries.

Q Well, have you asked persons in casual conversation or otherwise within the U.S. Attorney's Office?

A I may have. I probably didn't though.

Q Do you recall anyone in particular to whom you may have made that inquiry?

A No.

Q Do you recall ever getting an answer to that inquiry?

A No.

Q In fact, to your knowledge, there simply has been no specific investigation as to the number of persons within the Central District of California who haven't registered for the draft; isn't that right?

(Pg. 190, line 22 - pg. 191, line 3)

A To my knowledge by the federal government, that's correct.

Q But you would expect, sir, that the numer would substantially be larger than thirteen; isn't that right?

A I would expect so.

* * *

AMICUS CURIAE

BRIEF

Office-Supreme Court, U.S.
FILED
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No. 83-1292

In The
Supreme Court of the United States
October Term, 1984

DAVID ALAN WAYTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS; NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS; MENNONITE CENTRAL COMMITTEE, U.S. PEACE SECTION; CENTER ON LAW AND PACIFISM; FELLOWSHIP OF RECONCILIATION; AND JEWISH PEACE FELLOWSHIP IN SUPPORT OF PETITIONER

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Brief of Amici Curiae In Support of Petitioner

INTEREST OF THE AMICI[1]

This case presents the question whether the United States may validly investigate and prosecute for refusal to register with the Selective Service only those individuals who are selected pursuant to an enforcement program designed to identify vocal opponents to draft registration. The Court's decision, therefore, will necessarily affect organizations and individuals that share interests

[1]The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

similar to each of the groups participating here as amici curiae.

Amici believe that the number of interests implicated in this matter is most efficiently served through the submission of one consolidated brief. Accordingly, although the statement of interests is presented in several separate sections below, only one brief follows that statement.

A. Draft Counseling Organizations

The Central Committee for Conscientious Objectors ("CCCO") was established in 1948 to assist persons who find themselves facing conflict with the power of the State as a result of their conscientious objection to participation in any form of warmaking activity. Art. II, Constitution of the Central Committee for Conscientious Objectors.

CCCO has developed and distributed numerous publications to assist conscientious objectors, lay draft and military counselors, attorneys and the general public in their knowledge and interpretation of selective service and military laws. CCCO has trained and maintained a network of over 2,500 volunteer counselors for individuals faced with draft registration. Since July, 1980, over 30,000 individuals have registered with CCCO as conscientious objectors.

The National Interreligious Service Board for Conscientious Objectors ("NISBCO") is an organization working to defend and extend the rights of conscientious objectors. As a national organization it is supported by 10,000 contributors and by a consultative council of 35 national religious organizations.

The Center on Law and Pacifism is a cooperative providing legal and theological counseling for religious pacifists and conscientious objectors. The Center works with religious and other groups for disarmament and the reduction of institutional violence.

The issues raised by this case particularly concern draft counseling organizations, whose constituencies are most affected by the government's actions in implementing the passive enforcement policy. Their free exercise of speech, petition and religion is chilled by the message that those who express conscientiously-held beliefs, opposing participation in war, will be selectively prosecuted.

B. Religious Organizations

The Fellowship of Reconciliation ("FOR"), an interreligious organization founded in 1914, is one of the nation's oldest and largest pacifist organizations. Through its youth project FOR has been involved for many years in counseling young men confronted with draft registration and has provided employment for conscientious objectors from throughout the world. The FOR is an active participant in almost every coalition concerned with registration and the draft.

The Jewish Peace Fellowship ("JPF") unites those who believe that Jewish ideals and experience provide inspiration for a non-violent philosophy of life. Stimulated by elements in traditional and contemporary Judaism that stress the sanctity of human life, the JPF promotes respect for humanity and confidence in its essential decency. The JPF, founded in 1941, is the preeminent Jewish organization in the United States involved with the draft and with registration for the draft. It engages in scholarly research on the traditional and contemporary

Jewish position on the draft and on conscientious objection, and undertakes counseling of young men relating to the draft and registration.

Mennonite Central Committee ("MCC U.S.") is the cooperative relief and service agency of the Mennonite and Brethren in Christ Churches in the United States. Through its U.S. Peace Section, MCC U.S. coordinates Mennonite response to military conscription and draft registration.

Mennonite religious belief and practice holds that war is wrong, and that the individual is obligated by God not to kill any person. MCC U.S. is interested in this case because some Mennonite draft age men have been prosecuted for refusing on grounds of religious belief and conscience to register, and because MCC U.S. believes that these men and others who have varied religious, moral or ethical reasons for not registering have been unjustly targeted for prosecution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case places one of the most valuable and important rights of a free society—the right to criticize, disagree with and object to governmental policies—against an equally important right of the community—the ability to prosecute those who violate the law. Proper resolution of this case will not impair either of those rights.

David Alan Wayte is one of more than 500,000 young men who failed to register with the Selective Service as required by 50 U.S.C.App. §§ 453, 462. Yet at the time of the decision below, he was one of only 13 young men who the Government had prosecuted for that failure. Each of those 13 young men had a characteristic which distinguished him—each had expressed his opposition to the registration law.

The issue in this case is whether the Government may design and rely upon an enforcement program which knowingly and deliberately selects for prosecution only those violators who have exercised their right to criticize or object to the underlying law. Well-established principles of constitutional law and criminal procedure provide the answer to this question. Enforcement of the law and prosecution for a criminal offense may not be based on an impermissible reason—for example, the violator's race, religion or exercise of a constitutional right. The difficulty lies, of course, not in the principle but in its application. In this case, however, application of the principle is not difficult. The facts, as disclosed by the record and found by the district court, establish that the government adopted and implemented an enforcement program which it knew, and others soon realized, would result in prosecution only of those nonregistrants who were vocal critics of the law.

The ability of the government to prosecute those who violate the criminal law and the authority of prosecutors to exercise discretion in individual cases are not challenged or threatened by this case. Regardless of this Court's decision, violators of the law will be subject to prosecution; the decision need not interfere with prosecutorial decisions in individual cases. Reversal of the circuit court decision will merely reaffirm that prosecutorial discretion is subject to the constitutional requirements of due process and equal protection.

I. The right to petition for a redress of grievances predates the Magna Carta. The English Bill of Rights

prohibited any prosecution for an exercise of this right. The right was recognized in charters of American colonial governments. Its disregard by the English was a precipitating cause of the Declaration of Independence. The United States affirmed this right when it was included in the First Amendment. This Court has also recognized the importance of this right in its decisions.

Although hundreds of thousands of young men have failed to comply with the registration law, only a few have been prosecuted. Those who have been prosecuted noted that their opposition was not prompted by lack of respect or patriotism. In letters to Congressmen, President Carter and Selective Service, these young men disagreed with draft registration on the basis of a moral and, for many, a religious commitment to principles they viewed as inconsistent with the act of registration. Whether considered of great moment or trivial, these letters constitute statements on issues of public, political and religious significance, protected by the First Amendment. When the government, from thousands of suspected law violators, selects only vocal nonregistrants for prosecution, the fundamental First Amendment right to petition is impaired.

II. A. Application of the law may not be based on a person's race, religion or the exercise of a constitutional right. Discrimination against a recognizable, distinct class violates principles of equal protection, encompassed in the Fifth and Fourteenth Amendments.

This Court has outlined the elements of a prima facie case of invidious discrimination in the context of a criminal prosecution. In this case, the petitioner must provide evidence sufficient to create an inference of improper intent. He must establish: (1) he is a member of a recognizable, distinct class that has been singled out for different treatment; (2) there has been disproportionate prosecution of members of this class; and (3) the prosecutorial selection procedure was susceptible of abuse or not neutral.

B. Petitioner is a member of a distinct, recognizable class of vocal nonregistrants. Only members of this class have been indicted for failure to register. Thus, since 100% of those prosecuted were vocal opponents of draft registration, petitioner has established the fact of disproportionate prosecution.

The selection procedure utilized by the government is known as the "passive enforcement system." This administrative policy resulted in the indictment and prosecution solely of vocal nonregistrants, because it considered only those who wrote the government and indicated their refusal to register and those reported by neighbors and others as persons who refused to register. A neutral or random selection procedure, by contrast, would have selected both vocal and nonvocal nonregistrants for prosecution. By establishing that this policy was not neutral, the petitioner presented a prima facie case of invidious discrimination from which an inference of improper intent is drawn. This shifts the burden to the government to dispel the inference.

The petitioner presented further evidence supporting the inference of invidious intent. The government knew of the disproportionate impact of the passive enforcement system on those who exercised their First Amendment rights, but resisted the opportunity to correct this inequity. The government had two years to implement a neutral selection policy, but elected not to do so. In addition, the prosecutorial decisionmaking chain of command in this case deviated from normal procedures.

C. Prosecutorial discretion is not at issue in this case. First, the local prosecutor was not requested nor even permitted to exercise any discretion. Second, prosecutorial discretion can never immunize violations of a defendant's constitutional rights.

Before the District Court the government advanced no interest to support its reliance upon the passive enforcement system. Here it advances three bases—deterrence, need to prove willfulness, and administrative constraints.

Deterrence was not a genuine factor in the decision to rely on the passive enforcement system. This system does not deter nonregistrants from refusing to comply, it only teaches that expressions of opposition will be punished. Thus silence, and not compliance, is encouraged. A policy of deterrence intended solely to eradicate public expressions of dissent is improper.

Nor was the need to prove willfulness a factor in the decision to rely on passive enforcement. The government's "beg policy" established the necessary evidence for this element, by requiring that every suspected nonregistrant be informed of his duty to register and be offered another opportunity to register. Reliance from the start on this "beg policy" establishes that proof of willfulness was not part of the decision to rely on passive enforcement.

Nor were administrative constraints a factor. The government has never proffered cost as a justification, and its current use of an active system shows that cost was not the motive for passive enforcement. Even were the costs severe, that would not justify abridgement of a constitutional right. Similarly, the District Court found

that the government could locate numerical nonregistrants if it attempted to do so.

None of the proffered bases was a motivating factor in the government's reliance on the passive enforcement system. The government has not dispelled the inference of intentional discrimination, so the indictment must be dismissed.

ARGUMENT

I. THE PASSIVE ENFORCEMENT SYSTEM IMPLICATES A FUNDAMENTAL RIGHT—THE RIGHT TO PETITION FOR A REDRESS OF GRIEVANCES

A. Historical Foundation and Background of the Right

The issue presented by this case arises out of the expression of objection to a controversial law by the petitioner, David Alan Wayte, and by other young men directly affected by the law. Their expressions of criticism are within the honored tradition of this country. Proper resolution of this case requires a full appreciation of the importance of that right.

The right to register objection to government policy is part of the right to petition the government for redress of grievances. The concept of the right to petition for redress predates the Magna Carta. D. Smith, *The Right To Petition For Redress of Grievances: Constitutional Development and Interpretations* 272 (1971). The Magna Carta, however, is generally considered the origin of the right. Chapter 61 provided that Parliament could petition the King for redress of grievances. *See* C. Stephenson & F. Marcham, *Sources of English Constitutional History* 125 (1937). "In the seventeenth century the organization of

petitions became a method of propaganda, and some of the most fundamental political ideas of the Commonwealth period are to be found in them." 12 *Encyclopedia of the Social Sciences* 98 (1935) ("*Encyclopedia*"). For example, the Petition of Right in 1628 by the Commons dealt with "Illegal taxation, arbitrary imprisonment, billeting of soldiers on individuals and punishment by martial law." *Id.* at 99.

Another important advancement in the right occurred in 1669 when, for the first time, the right of citizens to petition the Parliament for a redress of grievances was established. *Encyclopedia*, *supra*, at 99; Smith, *supra*, at 63. The strongest affirmation of the right in its English history appears in the English Bill of Rights in 1689—"it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." Smith, *supra*, at 269; *Encyclopedia*, *supra*, at 99.

The right of petition was thus well recognized and firmly entrenched at the time of the American colonization. "The right of petition was regarded in the eighteenth century both in England and in America as a natural right which despotism itself could hardly stoop to withhold." *Encyclopedia*, *supra*, at 100. The right also played a vital role in the development of colonial governments and their eventual decision to declare their independence. As one of the "ancient liberties" of Englishmen, the right to petition was recognized in over fifty provisions of the various colonial charters. Smith, *supra*, at 269. In 1765 the Stamp Act Congress of the American colonies asserted in its Declaration of Rights "[t]hat it is the right of the British subjects in these colonies, to petition the King or either house of parliament." *Encyclo-*

pedia, *supra*, at 100. The Declaration of the First Continental Congress in 1774 noted that "reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his Majesty's ministers of State" and went on to declare that the people of the colonies "have a right peaceably to assemble to consider their grievances, and petition the king; and that all prosecutions, prohibiting proclamations and commitments for the same are illegal." Smith, *supra*, at 61, 64.

The continuing disregard by the English of the petitions of the colonies was a precipitating cause of the Declaration of Independence. Smith, *supra*, at 270; *Encyclopedia*, *supra*, at 100. In fact, the Declaration of Independence lists as one of its grievances the disregard of the petitions: "In every stage of these Oppressions . . . We have Petitioned for Redress of the most humblest terms: Our repeated Petitions have been answered by repeated injury." After gaining its independence, the United States affirmed the right of the people to petition the government for redress by including that right in the First Amendment.

B. Judicial Construction of the Right

Through its modern history in America, the right to petition for redress of grievances has encompassed the right to assemble, and the freedom to register objection to government policy or laws and to comment on issues of political and social significance. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institu-

tions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."); *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.")

C. The Significance of the Right In This Case

Hundreds of thousands of young men failed to comply with the registration law. Only a few of them spoke out against the law. They did so at enormous consequence. As one of them stated to his Congressman in a letter explaining his decision not to register:

> The obvious consequences are $10,000 fine and up to 5 years in prison. Not so apparent are things like an interruption of my education, loss of my right to vote, a prison record which could and most probably will interfer (sic) with any job for which I might apply, loss of friends and acquaintances and respect. . . . (Letter of Enten Eller to Congressman Jim Lloyd, August 4, 1980.) (Jt. App. 122.)

The decision of these individuals to express opposition to draft registration was not prompted by lack of respect for this country or the important freedoms it assures them. As Benjamin Sasway, one of those prosecuted and later sentenced to prison, stated in his letter to President Carter: "I love my country and would defend it in a time of crisis." (letter of July 24, 1980.) (Jt. App. 93.) Others expressed the same point: "Please do not construe this as

a lack of patriotism on my part." (Letter of Gillam Kerley to Henry N. Williams, general counsel for Selective Service System, December 28, 1981) (Jt. App. 171.). Rather, the decision of those young men later selected for prosecution to vocalize their disagreement with draft registration was founded upon their moral and, for many, religious commitment to principles they view as inconsistent with the act of registration with the Selective Service.

> I am not trying to oppose the United States government, nor am I attempting to cause problems for the Selective Service. Simply, I cannot conscientiously register for the draft. I feel that God has called me to not register. Therefore, I will not register. True, as a Christian, I am called to obey my government at all times that to do so would not conflict with my following God and Christ Jesus. (I Peter 2:13-17, Romans 13:1, 5-8) However, registration for the draft for me has fallen into the area of confliet, and my belief is that when God and the government conflict, God must be obeyed. (Letter of Enten Eller, to Cong. Lloyd, *supra*, Jt. App. 122-123.)

It is of no consequence whether one finds such decisions and statements matters of great moment or trivial. Each one of them, regardless of eloquence or sophistication, is a statement on an issue of public, political and religious significance. Each may be looked upon with scorn or with respect. Each must, however, be recognized as a statement protected by the First Amendment. The First Amendment is intended to secure "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484

(1957). If our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), is to be fulfilled and furthered, this Court must take special care to ensure that those who speak out can do so without fear of reprisal or punishment. *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). Such special care is appropriate in this case. When hundreds of thousands violate the law and the thirteen that are prosecuted are among those few who have spoken out, the government transmits an unmistakable message that impairs this fundamental right to petition.

II. UNDER TRADITIONAL PRINCIPLES OF EQUAL PROTECTION, THE COURT SHOULD ORDER DISMISSAL OF PETITIONER'S INDICTMENT BECAUSE HE WAS SELECTED FOR PROSECUTION BASED ON HIS EXERCISE OF THE RIGHT TO PETITION

A. Equal Protection Analysis Applies to Individual Decisionmaking

It is fundamental that the application of the law may not be based on a person's race, religion or the exercise of a constitutional right. Where a state discriminates against a recognizable, distinct class, a member of that class may challenge the state's action as violating the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 492 (1977); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). The Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from the same invi-

dious conduct. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239 (1976); *Bolling v. Sharpe*, 347 U.S. 497 (1954).[1]

In *Cox v. Louisiana*, *supra*, this Court applied equal protection analysis to a claim of invidious discrimination. The Court noted that:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute. 379 U.S. at 557-558.

Similarly, in *Castaneda v. Partida*, *supra*, this Court applied equal protection analysis to an allegation that there was invidious discrimination in grand jury selection. This Court outlined the elements of a prima facie case of invidious discrimination in the context of a criminal prosecution. 430 U.S. at 494-495. First, the defendant must establish that the group allegedly discriminated against constitutes a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Second, the defendant must show a statistical deviation (there, underrepresentation) over a significant amount of time. Finally, to support the statistical presumption of discrimination, the defendant must show the selection procedure is susceptible of abuse or not neutral (that is, that the statistical deviations were not simply the

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[1]Amici agree with petitioner that First Amendment analysis should apply in this case, because the constitutionality of a policy, rather than an act of individual decisionmaking, is at issue. If this Court disagrees, and determines that this case should be analyzed under principles of equal protection law, the result is the same. The indictment should be dismissed.

accidental result of a properly designed and implemented program). Once these three steps are satisfied, the defendant has presented a prima facie case of discriminatory purpose. The burden then shifts to the government to dispel the inference of intentional discrimination.

A similar analysis should be used to determine whether Wayte and the other vocal nonregistrants have been denied equal protection of the laws. For Wayte to establish a prima facie case of impermissible or discriminatory governmental selectivity, he must provide evidence sufficient to create an inference of improper motive. That is, he must establish: (1) he is a member of a recognizable, distinct class that has been singled out for different treatment; (2) a statistical analysis establishes disproportionate prosecution of members of this class; and (3) the prosecutorial selection procedure was susceptible of abuse or otherwise not neutral.[5]

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[5]The Circuit Courts of Appeal have developed a doctrine of "selective prosecution" to protect against unequal application of the law in the context of criminal prosecutions. *See, e.g., United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983); *United States v. Wilson*, 639 F.2d 500, 503 (9th Cir. 1981); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1979); *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974).

Although derived from equal protection cases as far back as *Yick Wo*, the selective prosecution analysis developed by the Courts of Appeals does not follow the traditional analysis used in other equal protection cases. Amici submit that the test utilized by the Courts of Appeals collapses the equal protection analysis, requiring the defendant to disprove any possible legitimate justification as part of his prima facie case. The uncertainty or ambiguity of the Circuit Court of Appeals standard may explain why, with identical facts, the Sixth Circuit Court of Appeals in *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983), *pet. for cert. filed*, No. 83-2035, and the Ninth Circuit below, reached contrary results; this may also explain why the district courts below and in *Schmucker* also reached contrary results.

(Continued on next page)

B. Wayte Established a Prima Facie Case of Unequal Application of the Laws

1. Wayte Belongs to a Recognizable, Distinct Class That Has Been Singled Out For Different Treatment

Both the District Court and the Ninth Circuit agree that Wayte was treated differently from the overwhelming majority of nonregistrants.

> The District Court found that over 500,000 eligible men had failed to register for the draft. When this indictment was dismissed, only 12 others had been indicted for failure to register. All were vocal nonregistrants. The government does not dispute these facts. (710 F.2d at 1387; Pet. App. A9.)

Nor can there be any question that Wayte is a member of a distinct recognizable class. Although the government has asserted that the only class Wayte belongs to is a group of youth required to register for the draft who confessed their noncompliance with the law, the facts overwhelmingly demonstrate that Wayte, like the 12 others prosecuted at the time of the District Court's decision, was a vocal opponent of the draft, a citizen who exercised his right of freedom of speech and to petition the government for a redress of his grievances. Each of the 13 young men prosecuted for violation of the draft registration law had been an outspoken dissenter against the draft and the

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(Continued from last page)

Should this Court determine that this case should be analyzed not by First Amendment principles, but by principles of equal protection, Amici request that this Court clarify that the equal protection analysis utilized in this Court's decisions is the proper analysis for claims of invidious discrimination in criminal prosecutions.

draft registration program. (549 F. Supp. at 1382; Pet. App. at A26.)

Wayte, for example, had written President Jimmy Carter two letters of opposition, and had publicly voiced his opposition to draft registration at numerous demonstrations across the country. *(Id.* at 1383, Pet. App. at A29.) Wayte's letters to the President, although candidly including an admission that he did not intend to comply with the draft law, are classic examples of an exercise of the right to petition the government for redress of grievances. His letters to President Carter illustrate a basic instance of an individual most affected by a particular law or policy expressing his disagreement with that law or policy directly to those responsible for its enactment and enforcement. Wayte's exercise of this right to petition to the government is no different than those discussed in Section I, above. *E.g., Eastern R.R. Pres. Conference v. Noerr Motor Freight, supra.*

In summary, there is no question that Wayte belongs to a distinct, recognizable class which has been treated differently from other nonregistrants.

2. A Statistical Analysis Establishes Disproportionate Selection of Vocal Nonregistrants for Prosecution

The government has never disputed that more than 400,000 and perhaps as many as one million young men had failed to register for the draft at the time of the pretrial proceedings in this case. Yet only 13 of these men had been prosecuted. Thus, the government prosecuted less than .003% of the total number of young men it believed had failed to register. Looked at from a different viewpoint, 100% of those prosecuted belong to the class of those who had vocalized their opposition to draft registration. Not a single individual had been prosecuted who had not similarly expressed his opposition to draft registration. Wayte therefore has established this second prong of the equal protection analysis.

3. The Selection Procedure Utilized by the Government is Susceptible of Abuse and Is Not Neutral

The selection procedure utilized by the government is known as the "passive enforcement system." The District Court found that the government administrative policy resulted in the indictments and prosecutions *solely of* vocal nonregistrants. (549 F. Supp. at 1382; Pet. App. at A26.) By design and not only in practice, the passive enforcement system selected for investigation and prosecution only individuals who expressed dissent against the draft and draft registration. As a Justice Department memorandum to Attorney General Smith from Assistant Attorney General Jensen explained, the Selective Service referred to the Justice Department for investigation and possible prosecution the

> names of young men who fall into two categories: (1) those who wrote to Selective Service and said that they refused to register and (2) those whose neighbors and others reported them as persons who refused to register. (Jt. App. 245.)

A neutral or random selection procedure would select both vocal and nonvocal nonregistrants for prosecution. In contrast, the passive enforcement system only selected

vocal nonregistrants for prosecution. Therefore, the third prong of the equal protection analysis, namely whether the selection procedure was neutral, was also satisfied by Wayte. Having satisfied each prong of the equal protection test, Wayte established before the District Court a prima facie case of invidious discrimination from which an inference of improper intent is drawn. The burden then shifts to the government to demonstrate a legitimate basis for its selection of Wayte for prosecution. If this basis dispels the inference, then the burden again shifts to Wayte to show that the proffered bases are pretextual.

4. In Addition to the Three Prongs of the Equal Protection Test, There Is Additional Evidence From Which Discriminatory Intent May Be Inferred

Wayte established a stark statistical pattern, whereby the government utilized a content-based selection procedure for the investigation and prosecution solely of vocal nonregistrants for noncompliance with draft registration laws. As this Court has recognized before, such a clear pattern, equal to the discriminatory pattern found in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) and in *Yick Wo*, *supra*, is powerful evidence of intent. This helps make the "evidentiary inquiry . . . relatively easy" and by itself may permit a determination of improper intent. *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977). *See also Washington* v. *Davis*, 426 U.S. 229, 241 (1976). *Cf. McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282-84 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973).

Notwithstanding the overwhelming statistical proof, there is additional circumstantial and direct evidence supporting the inference of invidious intent. As this Court recognized in *Arlington Heights*, other factors may reveal whether a challenged action resulted from improper motives. These factors include the historical background of the challenged action, the specific sequence of events leading to the challenged decision, departures from the normal procedural sequence, and available administrative history. 429 U.S. at 267-268.

Wayte established that the government knew its enforcement system selected only vocal nonregistrants for investigation and prosecution. The District Judge found that the government knew from the inception that its passive enforcement program would have a disproportionate impact on those suspected violators who were exercising their First Amendment rights, and was likely to result in claims of selective enforcement. (549 F. Supp. at 1284; Pet. App. at A30-31.) Despite this knowledge and despite the pleading of some senior officials, the government resisted the opportunity to correct the inequity in its enforcement program. It made no effort to seek the identities of nonvocal nonregistrants. As this Court has recognized, "adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence . . . is one factor among many others which may be considered by a court . . .'" in determining whether a decision was based on an impermissible ground. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979).

Second, despite having two years to implement an active enforcement program which would select violators for prosecution by a neutral, random selection process, the government chose affirmatively to do nothing, to make no

effort to search for any violator of the draft registration laws.[4]

Draft registration was reinstituted in 1980, yet no indictment was returned for failure to register for the draft until 1982. The District Court found, and the government conceded, that neutral sources of information such as driver's licenses or social security numbers were available. Armed with the list of those who had registered, the government, with access to driver's licenses, could have matched the class of those required to register against those who had registered, and thereby learned the identity of numerous nonregistrants.[5] Moreover, the District Judge found that the Federal Bureau of Investigation could locate nonregistrants but was not asked to do so. (549 F. Supp. at 1381; Pet. App. at A25). This conduct is further evidence of adherence to a particular policy despite knowledge of disparate impact.

Third, the prosecutorial decisionmaking chain of command in this case was far different from that of a regular criminal prosecution. (*Id.* at 1382; Pet. App. at A26-27.) Wayte's name was not forwarded to local law enforcement officers or federal prosecutors for investigation and possible prosecution when knowledge of his suspected nonregistration was first made known to the government. Rather, information concerning Wayte was collected along

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[4]"Selective Service has done nothing in these cases to determine the identities of people who have not registered." Affidavit of Edward Frankle, Selective Service Special Assistant to the Director of Compliance, September 23, 1982. Jt. App. 630-31.

[5]549 F. Supp. at 1381 & n.6. Pet. App. at A24-25. The government apparently is now using this neutral, active enforcement system. (Gov't Br. at 7, n.4.)

with information concerning other critics of the registration law. After study, discussion, and debate by senior government officials, a decision was made to utilize information gathered on these critical, suspected nonregistrants as the sole pool for possible prosecution. Thus, pursuant to this decision, the names of Wayte and others like him were transmitted down the prosecutorial chain of command.[6]

As this Court has recognized, "the specific sequence of events leading up to the challenged decision also may

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[6]*See generally* Affidavit of Edward A. Frankle, Jt. App. 627-654.

"[T]he letter from Mr. Wayte was treated as were all other letters received on the same topic, and it was placed inside a standard file folder in a file cabinet in my office. All of the letters received were placed in that file folder and there was no differentiation made concerning how the letter was received, whether it came directly to Selective Service or from another agency, or whether the information contained was obtained from a letter or a telephone conversation.

After a period of several months . . . I reviewed all of the letters that were in the file folder in my file cabinet. By this time, I believe there were somewhat in excess of 250 individuals identified in that file. The first thing that I did was to read over each letter to determine whether the letter or telephone tip received contained enough information to justify further processing. . . . After the review I removed from the file and discarded all correspondence or notes relating to any individual who did not appear to be males within the year groups required to register. After that activity had been completed I took the file folder to our Public Affairs Office and had them review the names and check them against a microfilm file containing registration information. That review determined that some of the individuals who either turned themselves in or were turned in by others were registered with Selective Service. At that time I removed from the file any documents related to registered individuals." (Jt. App. 633-636.)

shed some light on the decisionmaker's purpose." *Arlington Heights*, *supra*, at 267. *See also United States v. Falk*, 479 F.2d 616, 622 (7th Cir. 1973). As the District Judge found in this case, "the involvement of high Government officials in enforcement and prosecution decisions regarding non-registrants strongly suggests impermissible selective prosecution." 549 F. Supp. at 1383; Pet. App. at A30. In summary, not only has Wayte established the three prongs of a prima facie equal protection case, from which an inference of discriminatory intent is made, but he has also presented overwhelming evidence, for the most part undisputed, supporting this inference. Thus, the District Court properly shifted the burden to the government to dispel this inference of improper intent.

C. The Government Failed to Establish A Permissible Basis for Wayte's Prosecution

In its Brief in response to the Petition for Certiorari, the government cites cases relating to the broad discretion of the prosecutor. However, prosecutorial discretion is not at issue in this case. First, the local prosecutor was a mere functionary. He was not requested nor even permitted to exercise any discretion. The decision to prosecute Wayte was made when the Selective Service in conjunction with the Department of Justice implemented the passive enforcement policy, a policy that necessarily selected for prosecution only individuals like Wayte who had vocally disagreed with governmental policy.

Second, even if discretion had been exercised in this case, this Court's decisions demonstrate that prosecutorial discretion can never immunize violations of a defendant's constitutional rights. As this Court recently stated in the administrative law context:

> [T]raditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980).

Similarly,

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see North Carolina v. Pearce, supra, at 738, (Opinion of Black, J.) and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

The government has asserted three purported bases for its selection of David Wayte for prosecution. None of these three bases—deterrence, need for use of statements as proof of willfulness, or administrative constraints—justifies the selection procedure utilized here. Hence, these explanations fail to dispel the presumption of discriminatory intent.

1. Deterrence

Before the District Court the government advanced no interest to support its reliance upon the passive enforcement system for investigation of suspected nonregistrants. Reliance on this system to prove willfulness or to avoid administrative constraints was initially mentioned only in the brief to the Ninth Circuit seeking to upset the District Court's dismissal of the indictment. Now, for the first time, the government asserts as a basis for this prosecution that it relied on the passive enforcement system for

deterrence.[7] Not only did the government not raise the issue of deterrence below, but also it is simply unbelievable that deterrence was a genuine factor in the decision to prosecute individuals who had petitioned the governmment for a redress of grievances. The lesson of the government's passive enforcement policy is not that noncompliance will result in prosecution. Rather, the lesson is that only those who express their opposition to the draft will be prosecuted. The nonregistrant who either does not oppose the draft or opposes it silently will not be prosecuted and thus not deterred. Surely the government realized when it decided to focus its prosecutorial resources on vocal offenders that nonvocal nonregistrants would not be deterred.

In fact, government testimony before a Congressional committee illustrates the knowledge that the passive enforcement system would not deter nonregistrants. In his statement, Director of Selective Service Turnage, speaking to the issue of noncompliance with the draft law, suggested the following reasons:

> [T]he nonregistrants: (1) believed that the President would abolish draft registration, (2) thought they

[7]Amici submit that the government has waived this argument by its failure to present it below. *See generally* Fed. R. Crim. P. 12(f). Sound principles of judicial administration preclude an appellate court from considering arguments on issues of fact which were not raised or presented to the lower court. Where a party has shifted its position and advanced an argument available but not pressed below, and where that party has had an ample opportunity to raise that issue at the trial court in a timely manner, waiver bars raising that issue on appeal. *See, e.g., United States* v. *Sachs*, 679 F.2d 1015, 1018 (1st Cir. 1982); *United States* v. *Knuckles*, 581 F.2d 305, 310 2nd Cir. 1978); *United States* v. *Braunig*, 553 F.2d 777, 780 (2nd Cir. 1977). *Cf. United States* v. *Donnelly*, 397 U.S. 286, 295 n.6 (1970); *Hutcheson* v. *United States*, 369 U.S. 599, 609 (1962).

> would not get caught, (3) saw older peers who were not required to register and were resentful, (4) knew others who had not registered and were not penalized, and (5) planned to register only if the country were threatened.[8]

The passive enforcement system would have little deterrent effect on those who failed to register for the reasons stated by Maj. Gen. Turnage.

Therefore, any claim proffered by the government that the policy was designed to deter is further evidence of improper motive, for since there was no deterrent value for nonvocal offenders, a policy of deterrence intended solely to eradicate public expressions of dissent is clearly improper.

2. Proof of Willfulness

In order to prove the element of willfulness, the government asserted before the Ninth Circuit that it could deliberately prosecute only these who through public statements demonstrated a willful failure to register.

In her dissenting opinion below, Judge Schroeder cogently and succinctly demonstrated that the government did not rely on vocal expressions of noncompliance to prove the element of willfulness.

> [T]his case is unlike *Taylor* [693 F.2d 919 (9th Cir. 1982)] because the undisputed facts show that before

[8]Oversight Hearing on Selective Service Prosecutions before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., 10 (July 28, 1982) (Statement of Director of Selective Service, Maj. Gen. Thomas Turnage (Ret.)), Attachment 18, at 104.

initiating prosecution, the government wrote to each suspected violator offering him a chance to comply with the law. Only those who ignored this warning were prosecuted. Thus *Taylor* hardly compels reversing the district court's findings in this case, for here the government had a method, independent of suspected violators' communications, for excluding from prosecution persons who might have an innocent explanation for failure to register. (710 F.2d at 1390; Pet. App. at A16.)

In this case, the United States Attorney wrote a letter to Wayte urging him to register by returning an enclosed registration card and advising him of the legal consequences of his failure to register. Moreover, an agent of the Federal Bureau of Investigation also visited Wayte before any indictment was returned. (Jt. App. 726.)

Therefore, contrary to the argument presented by the government for the first time before the Ninth Circuit, it did not rely on public expressions of dissent to meet the intent requirement of the draft registration law. Rather the government, through its "beg policy," had already implemented a different procedure for procuring evidence of willful intent. Thus, this second proffered basis is simply not credible.

3. Administrative Constraints

Finally, the government has also asserted an inability to locate nonvocal nonregistrants. The District Court found "disingenuous" the government's claim "that it has prosecuted all known nonregistrants," noting that "it strains credulity to believe that the investigative agencies of our Government, especially the Federal Bureau of Investigation, could not locate any non-vocal non-registrant."

(549 F.2d at 1381; Pet. App. at A23.) This factual finding is supported by the evidence. Like the District Court, this Court should not permit conscious discrimination under the pretext of deliberate ignorance. Moreover, the fact that the government has now implemented an active enforcement system conclusively demonstrates that the government is able to locate nonvocal nonregistrants.

Although there is some suggestion in government memoranda that administrative costs were considered when the passive enforcement system was first instituted, the government has never proffered cost as a justification for its administrative decision to rely on the passive enforcement system. Moreover, implementation of an active system is demonstrable evidence that cost was not a factor in reliance on the passive enforcement system. In addition, even if the administrative costs had been severe, that would not justify abridgment of constitutional rights. *See Schneider v. State*, 308 U.S. 147, 162 (1939).

In summary, no basis offered by the government in support of its reliance on the passive enforcement system suffices to dispel the inference of discriminatory intent. In fact, these proffered bases reinforce the inference of invidious discrimination. An intent solely to deter vocal dissent is another instance of improper motive. In addition, the fact that the government did not propose any of these bases before the District Court is further evidence that no such basis existed. Since no proffered basis dispels the inference of discriminatory intent, this Court should hold that David Wayte has been denied equal protection of the laws and should order the indictment dismissed.

CONCLUSION

Wherefore, *Amici* respectfully request that this Court reverse the judgment of the Court of Appeals and reinstate the decision of the District Court dismissing the indictment against petitioner David Alan Wayte.

DATED: July 20, 1984

Respectfully submitted,

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PETITIONER'S

BRIEF

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No. 83-1292

IN THE

Supreme Court of the United States

October Term 1984

DAVID ALAN WATTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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Question Presented

Does it violate the First Amendment for the United States to create and employ an enforcement policy of investigating and prosecuting for refusal to register with the Selective Service only individuals identified through their vocal opposition to draft registration?

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No. 83-1292

IN THE

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DAVID ALAN WATTS,

Petitioner,

v.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A17)[1] is reported at 710 F.2d 1385. The opinion of the district court (Pet. App. A18-A47) is reported at 549 F.Supp. 1376.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1983. A timely petition for rehearing with a suggestion of appropriateness of rehearing *en banc* was denied on November 4, 1983. On December 20, 1983 Justice Rehnquist granted an extension of time within which to file a petition for a writ of certiorari to and including February 2, 1984. The petition for a writ of certiorari was filed on that date and was granted on May 29, 1984, limited to the first question presented in the petition. (Jt. App. 3.)

This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

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[1]Citations to portions of the record reproduced with the petition for certiorari will be given as Pet. App. A___; citations to material reproduced in the Joint Appendix will be given as Jt. App. ___.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people ... to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Petitioner David Alan Wayte was indicted on July 22, 1982 for failure to register with the Selective Service in violation of 50 U.S.C. App. (& Supp. V) §§ 453, 462(a). The district court dismissed the indictment on the ground that Wayte had been selected for investigation and prosecution on an unconstitutional basis (549 F.Supp. at 1201; Pet. App. A47), as well as on the ground that the presidential proclamation implementing the Military Selective Service Act was invalid. (*Ibid.*) A divided panel of the court of appeals reversed. (710 F.2d at 1389; Pet. App. A14.)

A. The Duty To Register

The Military Selective Service Act, 50 U.S.C. App. §§ 453, *et seq.*, provides that males between the ages of 18 and 26 may be required to register for the draft. The statute delegates to the President the authority to define the precise legal obligations demanded of potential registrants.

On July 2, 1980, pursuant to this statutory authority, President Carter issued Proclamation 4771, directing male citizens born during 1960 to register during the week of July 21, 1980; young men born in 1961 to register the week of July 28, 1980; and those born in 1962 to register the week of January 5, 1981. (45 Fed.Reg. 45247.) Presidential Proclamation 4771 ordered draft registrants to present themselves during certain hours before designated employees at specified post offices or before appropriately appointed registrars. The proclamation also confirmed prior presidential delegation of responsibility to the Director of Selective Service to prepare other rules and regulations that would complete the definition of the legal duty to register.

B. The Government's "Passive Enforcement" System

At the time of pretrial proceedings in this case, between 300,000 and 1,000,000 men from a total draft-eligible population of 9,000,000 had failed to register. Selective Service officials utilized the more precise figure of 674,000 nonregistrants.[5] A variety of explanations for such large-scale failure to register were offered at legislative oversight hearings.

Government officials told Congress that "lack of knowledge about the registration requirement is only one of several possible causes" for the level of noncompliance.[6] Other reasons suggested were that

> the nonregistrants: (1) believed that the President would abolish draft registration, (2) thought they would not get caught, (3) saw older peers who were not required to register and were resentful, (4) knew others who had not registered and were not penalized, and (5) planned to register only if the country were threatened.[7]

Private organizations testified that noncompliance with

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[5]Oversight Hearing on Selective Service Prosecutions before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess. 10 (July 28, 1982) (hereinafter Oversight Hearing) (Statement of Director of Selective Service, Maj. Gen. Thomas Turnage (Ret.)) (hereinafter Turnage); Jt. App. 413. On the floor of the House the same day, Rep. Solomon estimated 94% compliance and 700,000 nonregistrants. 128 Cong. Rec. 18475?.

[6]Oversight Hearing, Attachment 18, at 104 (Report by United States General Accounting Office, "Alternatives To Current Draft Registration Program Needed Unless Level Of Compliance Improves"); Jt. App. 413-14.

[7]Oversight Hearing, Attachment 18, at 104; Jt. App. 414.

the Selective Service law was, in part, grounded in moral, religious and political opposition to the registration requirement.[6]

In response to this overwhelming noncompliance, in 1981 the Selective Service established a limited enforcement system described by the government itself as a "passive enforcement" policy, through which it began to process information it received that specific men had not registered. The system was denominated "passive" "because Selective Service has done nothing in these cases to attempt to determine the identities of people who have not registered. . . . Selective Service is passively receiving the information as opposed to actively searching out violators."[7]

Under this system the Selective Service referred to the Justice Department for investigation and possible prosecution the

> names of young men who fall into two categories: (1) those who wrote to Selective Service and said that they refused to register and (2) those whose neighbors and others reported them as persons who refused to register.[8]

The Justice Department official responsible for overall enforcement of the draft registration law, David J. Kline, testified that "the decision whether or not to make referrals" for all investigations and prosecutions "rest[ed] with Selective Service." (Jt. App. 607.) The Service's passive enforcement system provided the only lists of

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[6] *E.g.*, Oversight Hearing, at 47 (Statement of D. Franz for the National Interreligious Service Board for Conscientious Objectors).

[7] Affidavit of Edward Franklin, Special Assistant to the Director of Selective Service for Compliance, September 23, 1982; Jt. App. 630-31.

[8] Memorandum to the Attorney General from D. Lowell Jensen, Assistant Attorney General, Criminal Division, July 14, 1981; Jt. App. 245.

suspected nonregistrants ever transmitted for investigation and prosecution. (Jt. App. 960.)

1. The Passive Enforcement System Inevitably Identifies Only Vocal Nonregistrants

By design and in practice, the passive enforcement system selected for investigation and prosecution only individuals who had expressed dissent against the draft and draft registration either publicly or by letter to the President or other government officials.

A June 30, 1982 Justice Department memorandum recognized that identifying only nonregistrants through the passive program meant that

> the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register. (Jt. App. 336.)[9]

Assistant Attorney General D. Lowell Jensen, in a memorandum to Attorney General William French Smith on June 29, 1982, tacitly conceded the system's disparate impact, concluding that development of an "active" enforcement system utilizing, for example, Social Security records would finally permit the government to "create an appropriate selection criterion, most probably one based on randomness." (Jt. App. 337.)[10]

The most detailed government analysis of the Selective Service passive enforcement system is found in a March 2, 1982 draft letter prepared by Kline for Jensen to send to Herbert C. Puschek, Associate Director of

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[9] David Kline testified before the district court that, from the inception of the passive enforcement program, he had been concerned about the issue of selective prosecution because the system identifies those individuals "who can raise a First Amendment type claim." (Jt. App. 901-02.)

[10] Jensen also recognized that defections identified only by the passive enforcement system "are liable to raise thorny selective prosecution claims." (Jt. App. 336.)

Plans and Operations for Selective Service. The latter warned of serious, indelible First Amendment problems:

> There is an even more important objection to the present scheme than that it wastes investigative resources. The present passive identification program is liable to result in adverse judicial decisions based on defendant claims of selective prosecution.
>
> . . . .
>
> Unfortunately, we believe that if the government initiates prosecutions with only the present passive identification scheme in place, there exists a real risk that the United States will lose at least a few of the initial cases. There is a high probability that persons who are reported by others are vocal proponents of non-registration. Since a passive identification scheme necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly lead to claims that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights. *See United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc). *Indeed, with the present universe of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning.* (Jt. App. 290-91, emphasis added.)

2. The Actual Effect of the Passive Enforcement System

The district court found, and the court of appeals did not dispute, that when Assistant Attorney General Jensen predicted that prosecution under the passive system would likely "consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons

who publicly refuse to register" (Jt. App. 361-62), he "underestimated the effect of the passive enforcement program." (549 F.Supp. at 1382; Pet. App. A26.) Even by the date of the Ninth Circuit's decision, more than thirty-six months after President Carter's July 1, 1980 order reinstituting the draft, the Justice Department had prosecuted young men exclusively by reliance on the passive system. As the district court concluded, the "persons prosecuted for failing to register . . . consisted *solely*, not largely, of vocal non-registrants." (*Ibid.* Emphasis in original.) The 13 individuals selected for prosecution by the passive enforcement system at the time of the district court decision represented less than .003% of the total number of young men believed by the government to have failed to register. Each of the 13, however, had been an outspoken dissenter against the draft and the draft registration program.[10]

Petitioner Wayte, for instance, had written the President two letters of opposition.[11] Beginning in January 1980, he appeared at numerous public demonstrations across the country and on many radio and television programs to express his opinions. (Jt. App. 126.) Benjamin Stanway, like Wayte, sent the President a letter opposing

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[10]See Declarations and Exhibits concerning the individuals selected for investigation and ultimately indicted as a result of the passive enforcement system at Jt. App. 72-222.

[11]Wayte's letter of August 4, 1980 to President Carter stated in part:

> I love my country. I believe that its Constitution is close to perfect, its laws the most just in the world. That is why it pains me deeply when a law is enacted which contradicts the basic tenets of freedom and democracy upon which my country was founded. You enacted such a law when you signed the draft registration bill. (Jt. App. 133.)

See also Declaration of David A. Wayte, August 12, 1982; Jt. App. 128-29.

draft registration,[15] and had stated his dissent on many occasions at public forums.[16] Gillam Keeley sent Congressman Robert Kastenmeier a copy of his September 1, 1981 letter to the Director of Selective Service; Representative Kastenmeier then responded by letter to Keeley a week later.[17]

Because the passive enforcement system does not rely upon traditional objective detection techniques for identifying nonregistrants, in "several instances" the individuals designated for investigation and possible prosecution were "persons . . . not within the registration class [who had] written to the Service expressing their refusal to register. One such person was an eighty-year-old retired minister." (Jt. App. 286.) The system also identified several women. (Jt. App. 333.)

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[15]Sauvey's four page letter stated in part:

> I am writing you this letter today, the day I'm supposed to register for the draft, as a symbolic statement of my opposition to *all* military conscription . . . .
>
> The assumption and underlying spirit of draft registration is that the draft is O.K. if the world situation gets bad enough to warrant its use . . . . I must protest draft registration just as I would protest the actual draft.
>
> I strongly believe that draft registration is morally wrong, unjustified in the spirit of the United States Constitution, and more generally, incompatible with a truly free society. It is wrong to make Law abiding citizens do anything against their will, especially if it is to learn to kill . . . .
>
> . . . I love my country and would defend it in a time of crisis. (Jt. App. 91-93.)

[16]Sauvey was convicted for nonregistration and sentenced to 30 months imprisonment. See *United States v. Sauvey*, reproduced at Jt. App. 664.

[17]Representative Kastenmeier stated:

> I appreciated your thoughtfulness in sending me a copy of your letter . . . regarding your refusal to register . . . .
>
> As you may know, I am opposed to peacetime military conscription, and I voted against providing funds to permit registration for the draft to begin last year. I shall continue to object to registration and peacetime conscription. (Jt. App. 141.)

(Footnote continued on next page)

5. The Government's "Bag Policy"

Although the Justice Department relied upon initial referrals from Selective Service pursuant to the passive enforcement system, the Department did develop its own procedures for handling cases once referred. A September 28, 1987 Justice Department memorandum stated that prosecution policy for all nonregistration cases

> requires that United States Attorneys notify alleged non-registrants by registered mail that, unless they register within a specified period of time, prosecutions will be considered. In most instances, the Federal Bureau of Investigation agents also attempt to interview alleged non-registrants if they continue to refuse to register. (Jt. App. 388.)

The memorandum described the policy as "designed to ensure that (1) the refusal to register is willful and (2) only persons who are most adamant in their refusal to register will be prosecuted." (*Ibid.*) David Kline testified that this "bag policy"[18] would be employed with any enforcement system utilized by the government, passive or active, to provide proof that a nonregistrant's refusal to comply with the law was knowing and intentional.[19]

C. Alternatives To "Passive Enforcement"

The district court found that "[t]he inference [was] strong that the Government could have located non-vocal nonregistrants, but chose not to." (549 F.Supp. at 1381;

(Continued from previous page)

Other vocal nonregistrants expressed religious, rather than political, grounds for their failure to comply. For example, Elaine Klier, a member of the Church of the Brethren and Charles Epp, a member of the Mennonite Church, sent letters to elected officials explaining that their opposition to draft registration was based upon religious beliefs, and publicly made their views known within their respective church communities.

[18]"The bag policy is: 'We ask you to register, and if you register any time before indictment, we do not prosecute you.'" (Jt. App. 842, testimony of David Kline.)

[19]See, *e.g.*, Jt. App. 843-45.

Pet. App. A23.) In December 1982 the government confirmed the point by formally implementing a new policy, "actively seeking out persistent nonregistrants for prosecution."[7] The new policy relies upon records of state drivers' licensing agencies that have always been available for enforcement purposes.[8]

Although the Justice Department had enlisted FBI agents to investigate each referral from the Selective Service's passive enforcement system, neither the Department nor the Service sought Bureau assistance "to apprehend suspected non-registrants not identified by the Passive Enforcement System." (Jt. App. 666-68, testimony of David Kline.) As the district court concluded, "[i]t strains credulity to believe that the investigative agencies of our government, especially the Federal Bureau of Investigation, could not locate any non-rural non-registrants." (549 F.Supp. at 1381; Pet. App. A23.)

David Kline acknowledged that as early as July 1980 he had become "very concerned that an Active Enforcement System be developed." (Jt. App. 677.) The March 5, 1982 letter from Jensen to Pruchnik stated that "the majority of our comments will address the issue of whether the Service should create an active identification system." (Jt. App. 294.) Kline testified that he drafted the letter because he "wanted whomever the decision makers were, to the maximum extent possible, to push for the Active Enforcement System." (Jt. App. 668.)

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[7] See 47 Fed. Reg. 57449 (December 9, 1982); Brief of Government in Response to Petition for Certiorari at 12 (hereinafter cited as "Gov't Br. ___").

[8] The district court pointed out that a law student working with the defense had demonstrated the easy accessibility and suitability for an active enforcement program of state drivers' license lists. (549 F.Supp. at 1381 n.7; Pet. App. A23.) "By comparing those lists with the Government's list of men who have actually registered, one should be able to identify non-rural non-registrants." (*Ibid.*)

In a February 1982 Selective Service report entitled "Increasing Selective Service Registration Compliance," the authors considered alternative enforcement techniques and found at least two of them to be both feasible and almost certainly more effective than the passive enforcement system. The report compared a system combining passive enforcement and increased publicity with active systems using either Social Security records or drivers' license lists. It concluded that the "[f]actors favoring [the passive] approach [were] its relatively low cost and ease of implementation." (Jt. App. 559.) The authors were unable to predict the "estimated yield" of additional registrants under the passive system, projecting it as "unknown." (Jt. App. 578.) By contrast, the active enforcement system using drivers' license records was projected to identify 100,000 additional nonregistrants. (*Ibid.*) The study predicted that operation of this system would impose an acceptable, "medium" administrative and financial burden on Selective Service. (*Ibid.*)

The report characterized an active system that relied upon Social Security records to identify nonregistrants as "the best means of enforcing the law," likely to produce 250,000 new registrants. Administrative burdens and financial costs of this system too were found to be within reasonable limits. Although the report observed that "[l]egal precedent has established that the best means to enforce a law must generally be used," it also cautioned that "[t]here would be some 'political cost' connected with implementation of this option." (Jt. App. 565.)

D. The Indictment Of Petitioner And The Proceedings Below

More than two years after President Carter issued Proclamation 4771, petitioner Wayte was indicted for

his failure to register with the Selective Service. He was selected for investigation pursuant to the passive enforcement system after having written two letters to the President expressing his opposition to draft registration and stating his intention not to register. Those letters were referred to the Selective Service for investigation.

On September 27, 1982 the district court granted Wayte's motion for an evidentiary hearing on the defense of selective prosecution. On October 29, 1982 the court issued a decision setting forth the basis for its finding of a prima facie case of impermissible selective prosecution and also entered various discovery orders in connection with the evidentiary hearing. The government refused to comply with these discovery orders.

On November 15, 1982, following the evidentiary hearing, the district court granted Wayte's motion to dismiss the indictment on the ground that he had been impermissibly selected for investigation and prosecution because of his exercise of First Amendment rights. (549 F.Supp. at 1391; Pet. App. A47.) As a separate basis for dismissing the indictment, the district court held that the time, place and manner requirements of Presidential Proclamation 4771 were invalid because the Proclamation was issued without the required notice and comment period. (*Ibid.*)

The Ninth Circuit, by a 2-1 decision, reversed the district court's dismissal of Wayte's indictment. The majority (Circuit Judge Wright and District Judge Coughenour) held that Wayte had not shown he was selected for prosecution from the general class of draft nonregistrants because of his exercise of constitutional rights. (710 F.2d at 1387; Pet. App. A11.) The court held that the undisputed proof concerning the existence

and use of the passive enforcement system did not establish a prima facie case of selective prosecution:

> The government may, in making prosecutorial decisions, "consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in the illegal activity." (710 F.2d at 1388; Pet. App. A11.)

The majority also held that Presidential Proclamation 4771 and the implementing Selective Service regulations are valid. (710 F.2d at 1388-89; Pet. App. A13-A14.) Circuit Judge Schroeder dissented. (710 F.2d at 1389-90; Pet. App. A15-A17.)

This Court granted the petition for certiorari on May 29, 1984, limited to the First Amendment challenge to the government's use of the passive enforcement policy. (Jt. App. 3.)

SUMMARY OF ARGUMENT

The Selective Service's passive enforcement system, by design and in actual practice, identified for investigation and prosecution only individuals who had expressed opposition to the draft and draft registration by writing protest letters to the President or to other government officials. Each of the 13 individuals indicted for failure to comply with the registration law at the time of the district court decision had been an outspoken critic of draft registration. Such a content-based regulatory system — focused exclusively on protected political expression — impermissibly burdens the exercise of First Amendment rights.

A. The letters written by the 13 young men investigated and prosecuted for nonregistration represent core political speech on important and controversial public issues. Their written communications to government officials also constitute a fundamental exercise of the First

Amendment right to petition for redress of grievances. The letters are politically-motivated communications that express dissent directly to officials charged with decision-making responsibility by the individuals most affected by those decisions.

The government does not assert that it could constitutionally indict a vocal nonregistrant for speaking against draft registration. The fundamental character of vocal protest as constitutionally protected speech is not eliminated simply because an individual's proclamation of dissent from a law might also identify him as a violator of that law.

Unlike the defendant in *United States v. O'Brien*, 391 U.S. 367 (1968), who argued that burning his draft card constituted protected expression, there is no assertion in this case that the act of nonregistration is itself protected by the First Amendment. The passive enforcement system, however, was not activated by violation of the law, but rather was aroused only by First Amendment activity conveying a particular political message. Even though the enforcement policy did not overtly punish protected speech as such, it inevitably created a content-based regulatory system with a concomitantly disparate, content-based impact on nonregistrants. The passive enforcement policy burdens the exercise of First Amendment rights by selecting for investigation and prosecution a narrowly and discriminatorily-defined group of vocal nonregistrants.

B. The government's "motive" in creating and employing this content-based regulatory system is irrelevant to appropriate First Amendment analysis. This Court has repeatedly held that governmental action that inhibits protected speech is impermissible, even when unintended. Indeed, even obviously benevolent motives will not validate otherwise unconstitutional governmental policy in the area of the First Amendment.

Analysis of motive may be material to disposition of certain First Amendment claims when the question turns on whether apparently independent official action in a specific case masks a hidden purpose of retribution for protected expression. Motive, however, is not relevant to a constitutional challenge to a general administrative policy, such as the passive enforcement system, that is inherently loaded against the First Amendment.

C. For the passive enforcement system to withstand scrutiny under the First Amendment, the government must demonstrate that the system furthers a substantial governmental interest unrelated to the suppression of expression and that the limitation of First Amendment freedoms created by the system is no greater than necessary to further those governmental interests involved. The government has failed to make the required showing.

Although deterrence of crime is a legitimate factor for the government to consider in any enforcement policy, it is apparent that the passive enforcement policy furthers no *general* deterrent interest because it is not a *general* enforcement policy. The nonregistrant who either does not oppose the draft or opposes it silently will experience no inhibition against breaking the law. What the policy encourages is silence, not compliance.

Similarly, the asserted interest in being able to prove a nonregistrant's willfulness in refusing to register fails to support use of the passive enforcement system to identify for investigation and prosecution only nonregistrants who have exercised their First Amendment rights. The so-called "beg policy," utilized by the Justice Department as part of its enforcement scheme, requires that every suspected nonregistrant be informed of his duty to register and provided with an opportunity to register. The

failure to respond to that request sufficiently establishes the required element of willfulness.

Finally, neither financial nor other administrative constraints dictated limiting the government's enforcement policy to identification of vocal nonregistrants. The government has implicitly acknowledged that the cost of an active enforcement policy is acceptable, since it has now implemented such a policy. Nor is it credible that the government was unable to locate any nonvocal nonregistrants. If Selective Service did not know the specific identities of quiet nonregistrants, the reason was that it had deliberately elected not to learn who they were.

The passive enforcement system is also constitutionally flawed because alternative enforcement systems that do not rely exclusively on the identification of vocal nonregistrants have always been available. The present enforcement scheme, utilizing active identification, could have been implemented at any time since renewed draft registration began. Because such less restrictive alternatives were available, the passive enforcement system's curtailment of First Amendment rights cannot be tolerated.

ARGUMENT

I. THE PASSIVE ENFORCEMENT SYSTEM CONSTITUTES AN IMPERMISSIBLE, CONTENT-BASED REGULATORY POLICY

A. Expressions Of Opposition To Draft Registration, Including Statements Of Noncompliance With The Registration Law, Constitute Protected Political Expression

Between August 1980 and February 1981 petitioner Wayte wrote several letters to government officials, including the President, that expressed both his opposition to the draft and draft registration ("It pains me deeply when a law is enacted which contradicts the basic tenets of freedom and democracy") and his intent "to obey [his] conscience rather than [the] law." In August 1980 Benjamin Saeway, like Wayte, wrote the President that he "strongly believe[d] that draft registration is morally wrong, unjustified in the spirit of the United States Constitution, and, more generally, incompatible with a truly free society." At the same time, Mark Schmuhler wrote Selective Service explaining that he believed registration would violate his religious convictions. On September 1, 1981 Gillam Kerley wrote the Director of Selective Service of his decision not to register, stating "[his] sincere hope that the government will reconsider its position" on draft registration. Each of the other young men investigated and prosecuted for nonregistration drafted similar letters to government officials.[9]

The contents of those letters represent core political speech "on public issues [that] 'has always rested on

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[9] It is undisputed that the first 12 young men indicted for nonregistration were identified as a result of letters they had written to government officials. Petitioner Wayte was unable to determine whether the thirteenth man indicted, Paul Jacob, had also written government officials regarding his views. Wayte did present un-

(Footnote continued on next page)

the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting from *Carey v. Brown*, 447 U.S. 455, 467 (1980)).[20] *See also FCC v. League of Women Voters*, 52 U.S.L.W. 5008, 5011 (U.S. June 16, 1984); *Connick v. Myers*, ___ U.S. ___, 103 S.Ct. 1684, 75 L.Ed.2d 708, 725 (1983) ("[T]he First Amendment's primary aim is the full protection of speech upon issues of public concern"). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).[21]

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controverted evidence to the district court that Jacob was a publicly prominent dissenter against the draft registration program, who had been the subject of many media reports. (Jt. App. 82-87, 211-13.) The government did not respond to repeated directives from the district court to disclose the manner by which Jacob was identified for investigation and prosecution.

[20]"A major issue during the 1980 presidential campaign was whether a draft should be instituted. Candidate Ronald Reagan criticized the Carter Administration decision to proceed with draft registration on the ground that 'it wouldn't be worth the bureaucracy it would create' (Kirwaldon, "The Flap Over Draft Registration — Only The Public Seems To Like It," 32 *National Journal* 645 (April 19, 1980)), but observed that "the most fundamental objection to draft registration is moral." (*Washington Post*, November 18, 1980, at A9.) Reagan continued that "[o]nly in the most severe national emergency does the government have a claim to the mandatory service of its young people. In any other case, a draft or draft registration destroys the very values that our society is committed to defending." (Letter to Sen. Mark O. Hatfield, reported at *id.* A9.)

[21]"[The First Amendment embodies] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In fact, there has existed active political debate over draft registration since the earliest days of our Republic. *Compare, e.g.*, Patrick Henry's declaration that the proposal to give Congress authority to raise an army "appears a very alarming power [which] must lead to despotism," quoted in

(Footnote continued on next page)

The written communications between these young men and government officials also constitute an elemental exercise of the First Amendment right to petition for redress of grievances. In *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-40 (1961), the Court held that a publicity campaign conducted by railroads against truckers to secure adoption of legislation, and other official activities antagonistic to the trucking business, was protected speech despite "any anticompetitive purpose it may have had." A contrary result would have "deprive[d] the government of a valuable source of information and, at the same time, deprive[d] the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139.

The letters written by Wayte and the other young men prosecuted for nonregistration are, if anything, constitutionally purer instances of the exercise of the right to petition for redress of grievances than were the lobbying activities at issue in *Noerr*. Each constituted a straightforward, politically-motivated communication designed to express dissent directly to officials regarding their decisionmaking by an individual most immediately affected by that decisionmaking. *Cf. NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at 913-15 (politically-motivated boycott to achieve racial equality held a protected exercise of right to petition.)[22]

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J. Leach, *Conscription in the United States* 25 (1952), with, *e.g.*, John Jay's argument emphasizing the need for the national government to possess such power, contained in the *The Federalist No. 4*, at 18-19 (J. Cooke ed. 1961).

[22]"It is immaterial for purposes of the First Amendment that the protest concerning the draft and draft registration may have been "privately communicated" to interested government officials, rather than expressed in a traditional public forum. *See Givhan v. Western Line Consolid. School District*, 439 U.S. 410, 413 (1979) ("We are unable to agree that private expression of one's views is beyond constitutional protection . . . .")

The government does not assert that it could constitutionally indict a vocal nonregistrant for speaking out against draft registration; prosecution for that reason, whether authorized by statute or administrative policy, would of course abridge the First Amendment. See, *e.g.*, *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (First Amendment forbids a conviction for disturbing the peace based on individual's wearing of a jacket inscribed "Fuck the Draft"):

> Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. *Yates* v. *United States*, 354 U.S. 298 (1957).[20]

Accord, *Schacht* v. *United States*, 398 U.S. 58, 63 (1970) (invalidating under First Amendment a federal prosecution for wearing military uniform without authorization when statutes sanctioned use in theatrical productions, provided use did not "tend to discredit" the military):

> [Schacht's] conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly

[20] The reference within *Cohen* v. *California* to "an intent to incite disobedience to or disruption of the draft," 403 U.S. at 18, recognizes that certain types of illegal advocacy are unprotected. *E.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). It is undisputed that advocacy of nonregistration, as in this case, creates no danger of "imminent lawless action" within the meaning of *Brandenburg*. *See Hess* v. *United States*, 414 U.S. 105, 108 (1973) (statement, "We'll take the fucking street later," made during anti-war demonstration, held constitutionally protected as no more than advocacy of illegal action at some indefinite future time).

> punishment for this reason would be an unconstitutional abridgement of freedom of speech.

That an individual's proclamation of dissent from a law might also credibly identify him as a violator of that law does not strip his vocal protest of its fundamental character as constitutionally protected speech. Wayte wrote the President, for example, that he intended "to obey [his] conscience rather than [the] law." Though plainly an admission that could be utilized as evidence in a prosecution against petitioner,[20] the statement clearly communicates firm opposition to the draft as well. Its message is no less politically expressive than the armbands held to be a constitutionally protected "silent symbol . . . of opposition to this Nation's part in the conflagration in Vietnam" (*Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 510 (1969)) or the jacket inscription in *Cohen* v. *California*, *supra*. As Justice Harlan stated in *Cohen*, 403 U.S. at 26:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

[20] If a "confession" of illegal conduct, Wayte's protest letters are hardly of the same character as the confession volunteered by Raskolnikov to Inspector Porfirich or the admissions that result from intensive custodial interrogation. *See generally Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Here, both the cognitive and emotive significance of Wayte's expression of noncompliance with the draft registration law are manifest.

B. The Passive Enforcement System Is A Content-Based Administrative Policy That Burdens Political Speech And The Right To Petition For Redress Of Grievances

Unlike the defendant in *United States v. O'Brien*, 391 U.S. 367 (1968), who argued that his action in burning his draft card constituted protected expression, petitioner Wayte does not contend that the act of nonregistration is itself "symbolic speech" protected by the First Amendment. The government may validly punish nonregistration — whether the violation is accompanied by protest or not, and whether or not the government introduces evidence that includes statements which also express protest. The issue presented by this case, however, is whether Selective Service may constitutionally create and employ an administrative policy — the "passive" enforcement system — that relies upon protected expression as the *sole* basis for investigation and prosecution of suspected nonregistrants. The question is not *if* the registration law is to be enforced, but *how*: Does exclusive use of a First Amendment trip-wire for investigation and prosecution impermissibly burden the exercise of protected rights?

By design and necessity, the passive enforcement system selected for investigation and possible prosecution only nonregistrants who exercised their First Amendment right to criticize the draft and draft registration by writing to government officials or by speaking out publicly. *Compare Selective Service System v. Minnesota Public Interest Res. Group*, 52 U.S.L.W. 5140, 5145 (U.S. June 26, 1984) (Powell, J., concurring) ("Section 1113 applies broadly and equally to every male citizen and resident alien who upon attaining 18 years of age is required by Presidential order to register with the Selective Service."). As the Justice Department itself acknowledged, the "inevitable effect"[20] of the policy at minimum was that "the first prosecutions [were] liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register." (Jt. App. 336.) Any person, whether or not required to register, who wrote and said, "I oppose the draft and therefore am not registering" was automatically referred for investigation and potential prosecution. Thus, the system identified and referred for investigation a number of vocal protestors who were not within the class of male citizens and resident aliens between the ages of 18 and 26, including an eighty-year-old retired minister and several women. (Jt. App. 288.) If a nonregistrant did not write such a letter, he was simply ignored. "The chances that a quiet non-registrant will be prosecuted is about the same as the chances that he will be struck by lightning." (Jt. App. 291, draft Jensen letter.)

The Selective Service passive enforcement policy was, therefore, not activated by violation of the draft registration law *or even* by First Amendment activity in general, but rather was aroused only by First Amendment activity conveying a particular political message. Even though the enforcement policy did not overtly punish protected speech as such, it inevitably created a content-based regulatory system with a communicatively disparate, content-based impact on nonregistrants.

Imposition of criminal liability for protected speech, of course, represents but one form of restraint on expression that this Court has invalidated.[21] See, *e.g.*, *Papish v.*

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[20] *See United States v. O'Brien*, *supra*, 391 U.S. at 383.

[21] Because quiet nonregistrants were effectively immune from prosecution, one commentator has argued that the passive enforcement system, in practice, made registration itself voluntary, but criticism of the registration program tantamount to a crime. Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 Colo. L. Rev. 144 (1984).

University of Missouri, 410 U.S. 667 (1973) (reinstating student after expulsion for distribution of an "underground" newspaper); *Tinker v. Des Moines Independent School Dist.*, *supra*, 393 U.S. 503; *Bond v. Floyd*, 385 U.S. 116 (1966) (overturning exclusion of elected representative from Georgia House of Representatives based on his remarks critical of the draft and Vietnam policy). If the character of the burden on speech from the passive enforcement system is relatively novel, this only suggests that constitutional scrutiny must be especially careful:

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restricted must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Sputnik v. Randall, 357 U.S. 513, 520 (1958).

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, ___ U.S. ___, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), this Court struck down a use tax that had been "tailor[ed] . . . so that it single[d] out a few members of the press . . . ." 75 L.Ed.2d at 309. The Court held that because the tax "selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers . . . ." *Ibid.* Here, no less than in *Minneapolis Star & Tribune*, the passive enforcement policy burdens the exercise of First Amendment rights by inherently selecting for investigation and prosecution only a narrowly and discriminatorily-defined group of vocal nonregistrants. As explained by Judge Merritt, writing for the Sixth Circuit in *United States v. Schmucker*, 721 F.2d 1046, 1050 (6th Cir. 1983), pet. for cert. filed, No. 83-2035, such an overtly content-based enforcement policy abridges core First Amendment rights:

> The trouble with this prosecutorial selection distinction is that a law punishing only draft nonregistrants who publicly confess by vocalizing their disagreement with the government's policies would violate the principle that "Congress shall pass no law abridging free speech." Like the Alien and Sedition Acts, such a law visits punishment on people solely because they have expressed rather than remained silent about their opposition to the government. It is no less a violation of the first amendment for the Executive Branch to give the draft registration law this construction for purposes of prosecution. (Pet. App. A52.)

The government's "motive" in adopting the passive enforcement system and thus creating a content-based regulatory system is irrelevant to appropriate First Amendment analysis. *E.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, *supra*, 75 L.Ed.2d at 309; *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). See Section II, below. Whatever the motive, the First Amendment requires that the passive enforcement system, because of its content-sensitive impact, "be demonstrably supported not only by a legitimate state interest, but a compelling one, and that [it] operate without unnecessarily circumscribing protected expression." *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982).[27]

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[27]The government acknowledges, at minimum, that the Selective Service passive enforcement system had the "incidental effect of identifying opponents of registration." (Gov't Br. at 18.) Thus, even if the policy were construed as facially content-neutral — something petitioner here would regard as inaccurate — it nevertheless can be

> sufficiently justified [only] if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, *supra*, 391 U.S. at 377.

II. GOVERNMENT MOTIVE IS IRRELEVANT TO FIRST AMENDMENT ANALYSIS OF THE PASSIVE ENFORCEMENT SYSTEM'S IMPACT ON PROTECTED EXPRESSION

The government has acknowledged at minimum that its "selection policy had the incidental effect of identifying opponents of registration, an eventuality anticipated in Department of Justice correspondence." (Gov't Br. at 18.) The system functions to single out for investigation and prosecution only advocates against the draft and draft registration who have publicly expressed dissent or have written letters of protest to the President or other government officials.[20] The signal from the policy was unmistakable: "A young man may violate the draft registration law with impunity provided that he does not confront the government with his moral or political outrage; the government will assure all nonregistrants immunity from prosecution if they remain silent." The passive enforcement system is activated by a First Amendment trip-wire.

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[20]The passive enforcement system was designed to identify for investigation and possible prosecution not only individuals who wrote to government officials and "self-reported," but also those "whose neighbors and others reported them as persons who refused to register." (Jensen memorandum, July 14, 1981; Jt. App. 245.) In fact, there appears to be no individual who was identified by a third party report under the passive enforcement system and ultimately prosecuted. See note 19, above. Moreover, because of the nature of the law violation at issue — "refusal to register" — only nonregistrants who have communicated to others their decision not to comply can be reported by third parties. Failure to register produces no eyewitnesses. What "neighbors and others" can perceive, however, are statements of protest and opposition either expressed directly or in a public forum. Thus, individuals identified as a result of either prong of the passive enforcement system share the common trait of being vocal nonregistrants. The government's policy of investigating and prosecuting only those vocal opponents of draft registration operates to chill equally all such forms of outspoken criticism by nonregistrants.

Notwithstanding the admitted workings of the passive enforcement system, the government attempts to uphold its operation by importing a novel standard into this Court's well-established constitutional doctrine regarding the rights of expression and petition for redress of grievances: the government would require petitioner to prove the government's evil intent or "motive":

> The proper test for determining whether prosecutorial selection is impermissible is whether its purpose is to retaliate against persons for the exercise of constitutional rights. (Gov't Br. at 18.)

The government's reliance on its asserted "good intentions" in adopting the passive enforcement system is improper. This Court held recently that it is not essential to "impugn the motives" of government officials in evaluating regulatory policies that burden First Amendment rights: "[I]llicit ... intent is not the sine qua non of a violation of the First Amendment." *Minneapolis Star & Tribune v. Minnesota Comm'r of Rev.*, *supra*, 75 L.Ed.2d at 309. This Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Ibid.*

In *Minneapolis Star & Tribune* a special tax on the press was struck down under the First Amendment in part because its *effect* was to "target a small group of newspapers" for disadvantageous treatment. 75 L.Ed.2d at 308-09. The Court viewed the problem "as one arising directly under the First Amendment," and concluded that

> The appropriate method of analysis is to balance the burden implicit in singling out the press against the interest asserted by the State. Under a long line of precedent, the regulation can survive only if the governmental interest outweighs the burden and cannot

be achieved by means that do not infringe First Amendment rights so significantly. (75 L.Ed.2d at 306 n.7.)

The ruling in *Minneapolis Star & Tribune* did not make new law. It has been previously and repeatedly held that "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of government action." *NAACP* v. *Alabama*, 357 U.S. 449, 461 (1958) (emphasis added). *See also NAACP* v. *Button*, 371 U.S. 415, 438-39 (1963) ("[I]t is no answer to the constitutional claims asserted . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (1938) ("Whatever the motive which induced its adoption [municipal ordinance prohibiting distribution of circulars without permit], its character is such that it strikes at the very foundation of the freedom of the press. . . ."). At least where a restriction upon freedom of expression is indisputably present, "it is difficult to see why the reason [motive] for the denial makes any difference." *Board of Education, Island Trees* v. *Pico*, 457 U.S. 853, 917 (1982) (Rehnquist, J., dissenting).[26]

Indeed, even obviously benevolent motives will not validate otherwise unconstitutional government policy in the area of the First Amendment. For example, in *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977), the Court nullified an ordinance that prohibited the posting of "For Sale" or "Sold" signs on real estate although

[26]This case does not raise the question whether an impermissible motive in and of itself may render an otherwise valid governmental action an unconstitutional restriction upon speech.

the ordinance's uncontested "vital goal" was "promoting stable, racially integrated housing." *Id.* at 94. *Cf. Thomas* v. *Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 717 (1981) (denial of unemployment benefits to Jehovah's Witness unconstitutional where unintended effect of compensation law burdens right to free exercise of religion).

Analysis of motive is material, of course, to the disposition of certain First Amendment claims. See, *e.g.*, *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 285-86 (1982) (allegation by teacher that contract not renewed because of exercise of right to free speech); *Perry* v. *Sindermann*, 408 U.S. 593 (1972) (same). But in those instances, unlike this case, examination for motive is necessary because what is tested is a government official's or agency's decision on a *specific* occasion where, absent proof of improper motive, the decision would appear to be constitutionally unassailable as an exercise of discretion neutral both on its face and in its design and operation. The concern in those cases is whether there lurks behind independently-determined and otherwise legitimate official action a hidden purpose of retribution for protected expression.

The issue of motive is similarly relevant to equal protection cases involving claims of impermissible selective prosecution, such as those cited by the government, in which the trial court is asked to review what appears to be the ordinary "exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings." (Gov't Br. at 15, quoting from *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.).)[27] By contrast, petitioner challenges here

[27]Under controlling Ninth Circuit law, *e.g.*, *United States* v. *Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972), to evaluate peti-

(Footnote continued on next page)

a general administrative scheme that is inherently and obviously loaded against the First Amendment, burdening the most conventional form of political speech — out-

(Continued from previous page)

tomer's defense the district court was required to analyze the government's motive in adopting the passive enforcement system. Based upon the evidence presented, the district court expressly found improper motive: "The inference is manifest that the defendant has been singled out for prosecution because he exercised his first amendment right to free speech." (549 F.Supp. at 1382; Pet. App. A28.)

That "inference" was premised upon substantial evidence presented at pretrial hearings. The district court relied upon uncontroverted documentary evidence that the government knew from the outset that under its passive enforcement program all young men whose names were referred by Selective Service to the Justice Department for investigation and possible prosecution (and, therefore, all men prosecuted) would be vocal opponents of the draft. In addition, the district court heard senior Justice Department legal adviser David Kline testify that he became troubled about selective prosecution claims in nonregistration cases immediately after his assignment in July 1980 to supervise enforcement of the registration law. A July 9, 1982 memorandum to Attorney General William French Smith conceded that eventual nonregistration defendants are liable to raise "thorny selective prosecution claims" (549 F.Supp. at 1382; Pet. App. A28), and concluded that other enforcement systems then being developed, using Social Security data, would finally permit the government to create an "appropriate selection system, probably based on randomness." (549 F. Supp. at 1381; Pet. App. A24.)

The district court also cited uncontradicted evidence of the passive system's actual results. Although the government recognized the existence of not less than a half million nonregistrants (549 F.Supp. at 1379; Pet. App. A21), officials undertook criminal investigations in not even 300 percent of that number of cases, and only against vocal dissenters. (549 F.Supp. at 1381; Pet. App. A24.)

Finally, the evidence analyzed by the district court documented that the normal prosecutorial sequence had not been followed in this case. (549 F.Supp. at 1382-83; Pet. App. A26-A27.) The court identified a series of decisionmaking involving the White House, the President's Military Manpower Task Force, Selective Service and the Department of Justice, resulting in unusual procedures that supported an inference of impermissible motive.

Although recognizing that it was required to use the "clearly erroneous" standard to review the district court's findings of impermissible motive, the court of appeals failed to identify a "definite

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spoken dissent. The passive enforcement system, not an individual prosecutor, selected Wayte (and the other young men indicted for nonregistration) for investigation and prosecution. Under *Minneapolis Star & Tribune*, this administrative policy must pass constitutional muster through analysis of the burden on speech imposed by that system assessed against the government's interest in utilizing the passive enforcement system rather than alternative systems available to it. That analysis need not, and should not, turn on motive. *Cf. Elrod v. Burns*, 427 U.S. 347 (1976) (*effect of policy of patronage dismissals held violative of First Amendment rights of political belief and association*).

III. THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT THE PASSIVE ENFORCEMENT SYSTEM FURTHERS A COMPELLING INTEREST AND DOES NOT UNNECESSARILY LIMIT PROTECTED EXPRESSION

If the passive enforcement system is to withstand scrutiny under the First Amendment, the government must demonstrate that its policy furthers "'an important or substantial governmental interest unrelated to the suppression of expression' and .... [that] 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Seattle Times Company v. Rhinehart*, 52 U.S.L.W. 4833, 4836

(Continued from previous page)

and his conviction that a mistake has been committed" by the lower court. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The court of appeals simply insisted that "Wayte has not shown that he was selected from the larger group because of his exercise of his constitutional rights." (710 F.2d at 1387; Pet. App. A35.) The court of appeals' single reference to the correct standard of review at the end of its discussion of selective prosecution is not sufficient. *See Pullman-Standard v. Swint*, 456 U.S. 273, 290-91 (1982).

(U.S. May 22, 1984); *NAACP v. Claiborne Hardware Co., supra*, 458 U.S. at 912; *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).[31]

A. The Passive Enforcement System Does Not Further Any Substantial Governmental Interest

The government advanced no interest whatsoever before the district court to support its reliance upon the passive enforcement system for investigation of suspected nonregistrants.[32] In the court of appeals two possible justifications were presented: "(1) the identities of other violators were not known, and (2) violators who expressed their refusal to register made clear their willful violation of the law." (710 F.2d at 1388; Pet. A11.) Before this Court the government has now suggested yet a third purported basis for the policy:

> In order to maximize the deterrent potential of criminal prosecution, the government may single out for prosecution those who will receive, or are likely to receive, the attention of the media. (Gov't Br. at 19.)

None of these purported rationales promotes a substantial governmental interest sufficient to justify the content-based burden on First Amendment rights created by the passive enforcement policy.

1. Deterrence

The government argues that it is permissible to design an enforcement policy intended to maximize the deterrent impact of a limited number of prosecutions and

[31]"To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (footnotes omitted).

[32]The district court nevertheless noted upon its own review of the evidence that government documents "are replete with instances of discussions regarding the cost of the enforcement programs." (549 F.Supp. at 1384; Pet. App. A31.)

asserts "even if one assumes that potential defendants were chosen because they sought to draw public attention (rather than merely the government's attention) to their failure to register — an assumption contrary to the evidence — such a policy would still not violate the Due Process Clause." (Gov't Br. at 19.)[33]

The general proposition is valid. Deterrence of crime is a legitimate factor for the government to consider in any enforcement policy. Nonetheless, regardless of how the government prefers to construe the evidence in this case, it is readily apparent that prosecutions under the passive enforcement system simply do not foster deterrence.

No matter the extent of media attention that prosecutions pursuant to the passive enforcement policy may engender, all nonregistrants outside the narrow reach of the policy remain conspicuously immune from investigation and indictment. If, for example, the government is correct that the passive enforcement system selects defendants because they seek to draw the government's attention, then the only action specifically deterred is the petitioning of government officials by opponents of the draft who write to express their opposition. If the policy instead also selects as potential defendants young men who seek to draw public attention to their protest against the draft, then the deterrent effect of the policy extends solely to public expressions of dissent by nonregistrants.

In either instance, the passive enforcement policy is blatantly underinclusive: There can be no *general* deterrence against nonregistration because the passive

[33]As demonstrated in Sections I and II above, because an enforcement *policy*, rather than an individual prosecutorial *decision* is challenged in this case, the question is whether the passive enforcement system violates the First Amendment, not the due process clause of the Fifth Amendment.

enforcement system is not a *general* enforcement policy. The nonregistrant who either does not oppose the draft or opposes it silently will experience no inhibition against breaking the law. He knows that as long as Selective Service relies exclusively upon passive identification, he is totally immune from prosecution.

In short, what the policy encourages is silence, not compliance. Indeed, if anything, the passive system may have increased the difficulty of enforcing the registration statute, for it offers the nonregistrant an assured course to escape official censure for his illegal conduct.

2. Proof of Willfulness

The Ninth Circuit held that the "government may, in making prosecutorial decisions, 'consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in the illegal activity.'" (710 F.2d at 1388; Pet. App. A11.) Once again, the general statement is an accurate description of a substantial government interest. This interest, however, fails to support use of the passive enforcement system to identify for investigation and prosecution only nonregistrants who have exercised their First Amendment rights.

From the inception of their efforts to enforce the registration law, the Selective Service and the Justice Department adopted a policy of attempting to induce all nonregistrants to comply voluntarily with the law before resorting to prosecution. (Jt. App. 389.) The so-called "beg policy" was to be utilized prior to any potential prosecutions for nonregistration, whether the prospective defendant was identified by an active *or* by a passive system. (Jt. App. 863-65, Kline testimony.) The policy required that the Department inform every suspected nonregistrant of his duty to register and pro-

vide an opportunity to register to remove the threat of prosecution.[34]

In this case, for example, the United States Attorney wrote a letter to petitioner Wayte urging him to register by returning a registration card and advising him of the legal consequences of his failure to register. Petitioner's failure to respond sufficiently establishes any required "willfulness." Sole reliance on his protected expressions of dissent to trigger prosecution is entirely unnecessary.

As analyzed in the dissenting opinion of Circuit Judge Schroeder, application of the "beg policy" prevents the present case from being one "where the offender's statements were necessary or even useful to establish willfulness":

> It therefore is not controlled by *United States v. Taylor*, 693 F.2d 919 (9th Cir. 1982). There, we affirmed the district court's findings that defendants had failed to establish selective prosecution for participation in an illegal strike. We pointed out that the failure to report to work alone was "an equivocal act" which could have had an innocent explanation. 693 F.2d at 923 n.5. Failure to register for the draft might similarly be explained by ignorance of the requirement. But this case is unlike *Taylor* because the undisputed facts show that before initiating prosecution, the government wrote to each suspected violator offering him a chance to comply with the law. Only those who ignored this warning were prosecuted. Thus *Taylor* hardly compels reversing the district court's findings in

[34] In most instances FBI agents would communicate the same message for a second time at a personal interview with the suspected nonregistrant. (Jt. App. 270.) An agent met with petitioner. (Jt. App. 726.)

this case, for here the government had a method, independent of suspected violators' communications, for excluding from prosecution persons who might have an innocent explanation for failure to register. (710 F.2d at 1390; Pet. App. A16.)[35]

3. **Administrative Constraints**

a. *Cost*

The government has never claimed "that financial or other constraints dictated limiting its enforcement policy to vocal violators" (710 F.2d at 1390; Pet. App. A16, Schroeder, J., dissenting), nor could it. The February 17, 1982 Selective Service study of available enforcement policy alternatives, "Increasing Selective Service Registration Compliance," found that operation of active enforcement options would impose a manageable "medium" burden on the government. Selective Service could plainly accept the costs. Indeed, since "the government has now implemented its policy of actively seeking out persistent nonregistrants for prosecution" (Gov't Br. at 12), it has implicitly acknowledged that the cost of an active enforcement policy is acceptable.[36]

b. *Identity of Violators*

The district court found "disingenuous" the government's claim "that it has prosecuted all known nonregistrants," holding that "[i]t strains credulity to believe that the investigative agencies of our Government,

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[35]Petitioner does not assert that the First Amendment necessarily precludes use of protected political expression as evidence of willfulness or any other element of the alleged offense. But the First Amendment does prohibit a government enforcement policy that selects for investigation and prosecution *only* those who engage in protected speech activities.

[36]Even if the administrative costs were more severe, they would not justify curtailment of the expressive interest in this case. See *Schneider v. State*, 308 U.S. 147, 162 (1939) (burden upon city in cleaning streets does not justify ordinance prohibiting distribution of handbills).

especially the Federal Bureau of Investigation, could not locate any non-vocal non-registrants." (549 F.Supp. at 1381; Pet. App. A25.) Undisputed evidence supported the ruling: officials within the Selective Service and Justice Department publicly stated that between 500,000 and one million young men had not complied with the registration law, yet deliberately sought FBI assistance not to identify actively any nonregistrants, but only to execute the "passive" enforcement system.

If Selective Service did not know the specific identities of nonvocal nonregistrants, it was only because it had deliberately elected *not* to attempt to learn who they were: "The availability of alternative enforcement methods is borne out by the fact that the government has now implemented a system for identifying quiet non-registrants." (710 F.2d at 1390; Pet. App. A17, Schroeder, J., dissenting.) The active enforcement system currently utilized was both feasible and available to the government when petitioner was first indicted, more than two years after President Carter issued Proclamation 4771.

B. The Passive Enforcement System Limits Exercise Of The Rights Of Political Speech And Petition For Redress Of Grievances While Less Restrictive Alternatives Are Available

Even if the interests claimed in furtherance of the passive enforcement system were "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *See also Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *United States v. O'Brien*, *supra*, 391 U.S. at 376-77; *Schneider v. State*, 308 U.S. 147 (1939). "The breadth of . . . abridgement must be viewed in the light of the least drastic means for achieving the

same basic purpose." *Shelton v. Tucker*, *supra*, 246 U.S. at 488.

In *Schneider v. State*, *supra*, this Court invalidated restrictions on the distribution of circulars, even though the policy at issue was wholly content-neutral, on the ground that any valid governmental purposes could be at least approximately achieved by alternatives with a lesser impact on protected speech:

> If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press. *Id.* at 164.

The government has always possessed alternative means to enforce the registration law that do not rely exclusively on the identification of vocal nonregistrants. The present enforcement scheme utilizing active identification could have been implemented at any time since renewed registration began:

> [A]s the district court pointed out, quiet non-registrants could easily have been traced. The district court noted that a law student armed only with a telephone was able to obtain lists, from several randomly chosen states, of persons legally required to register; those lists could have been compared with the government's list of actual registrants to locate violators. 549 F.Supp. at 1361 & n.6. The availability of alternative enforcement methods is

> borne out by the fact that the government has now implemented a system for identifying quiet non-registrants. (710 F.2d at 1390; Pet. App. A17, Schroeder, J., dissenting).

The discriminatory burden on First Amendment interests imposed by the passive enforcement system is removed once a reasonable enforcement system utilizing active investigation techniques exists. As demonstrated in the preceding section of this brief, such an active enforcement system would not be "less efficient" in advancing any legitimate governmental interest. Indeed, the deterrent effect of an active enforcement program may actually be far greater than that of the passive system. *Cf.* Report by United States General Accounting Office, "Alternatives to Current Draft Registration Program Needed Unless Level of Compliance Improves," note 4, above; Jt. App. 414.

In short, the burden on protected speech created by the passive enforcement system was unnecessary for the advancement of any governmental interest. Because less restrictive alternatives such as the current system using records from state drivers' licensing agencies, 47 Fed. Reg. 55445, were available, the passive enforcement system's curtailment of First Amendment rights cannot be tolerated. *E.g.*, *Shelton v. Tucker*, *supra*, 364 U.S. at 488.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals reversing the dismissal of the indictment against petitioner David Alan Wayte (see 710 F.2d at 1389; Pet. App. A14) should be reversed.

Dated: July 20, 1984

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DAVID ALAN WAYTE,
Petitioner,

V.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, SUPPORTING AFFIRMANCE

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NO. 83-1292

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DAVID ALAN WAYTE,
Petitioner,

V.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, SUPPORTING AFFIRMANCE

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") has previously appeared in this cause in the Ninth Circuit. It now appears in this honorable Court to urge affirmance of the Ninth Circuit's decision.

LFA is a nonprofit corporation supporting the operations of a tax-exempt, public interest law firm. It is located on the campus of the South Texas College of Law in Houston and shares certain personnel and activities with the law school. LFA's goals include the attainment of a better federal-state balance and the preservation of a system of criminal justice in which adjudications of innocence or guilt are reliable. In this endeavor, LFA has appeared as amicus curiae in this honorable Supreme Court, in the federal courts of appeals, in federal district courts, and in the courts of the several States. Its attorneys have also represented such agencies as the National District Attorneys Association and the majority of the Attorney General's Task Force on

Violent Crime in cases in this Court dealing with federalism and criminal justice.

National defense is one of the most fundamental functions of the federal government. The trial judge's reasoning on the "selective prosecution" issue, had it not been reversed, would have made it far more difficult for the national government to discharge this important function. LFA's expertise in criminal law matters leads it to believe that the trial judge's approach to the "selective prosecution" issue was erroneous.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case made by Petitioner, the United States.

SUMMARY OF ARGUMENT

Amicus curiae has not attempted to duplicate the detailed case-law arguments made by the United States, although we agree with those arguments and wish to express support for them. The emphasis in this brief is upon exploring the implications of the trial judge's decision for public policy.

I.

When there are massive violations of a particular law, which make impossible the prompt use of limited prosecution resources against all or even a large proportion of violators, there must of necessity be some principle by which the order of prosecutions is determined, assuming there are to be prosecutions at all. Virtually every ordering principle is subject to some criticism. The resolution of these criticisms is particularly unsuited for judicial determination. "Random" use of prosecution resources is itself "selective" and could serve as an ordering principle, but it is not unambiguously superior because it could cause the prosecution of persons less flagrantly guilty, whose guilt was shown by less evidence, and whose culpability was less serious. It would also require the gathering of information that would invade privacy interests more seriously than the government's passive approach.

When a person's statements cause detection of crime or constitute evidence of crime, the consideration of the evidence thus furnished does not violate the First Amendment. Any other approach would mean that use of a valid, voluntary confession would be unconstitutional.

II.

The approach adopted by the trial judge to the "selective prosecution" claim would, by its very nature, cause a high degree of intervention in legitimate prosecution functions that are necessary to protect the innocent or the less culpable as well as to cause prosecution of the guilty. That intervention would infringe upon the separation of powers.*

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* The District Court's decision was premised primarily upon the court's opinion in United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). That decision, which involved relatively few violation, concerned a situation different from the present case. The fundamental principles of United States v. Steele are unassailable: the burden of showing selective prosecution is upon the accused, the selection must be proved to have been deliberately based upon an unjustifiable standard, but the mere exercise of prosecution discretion, or, as the Steele court stated, "mere selectivity" in prosecution, creates no constitutional violation. *Steele* does, again unassailably, hold that the prosecution of an alleged defender merely because he is "vocal" in the exercise of First Amendment rights would be improper. The Steele court did not say, however, that prosecution based upon evidence of the violation obtained through defendant's statements is unconstitutional. Furthermore, *Steele* concerned a prosecution arguably retaliatory to protected expression not evidencing violation—a situation sharply different from the present case.

Upon appeal, the Ninth Circuit itself distinguished its own decision in *Steele*, so that it is no longer relevant authority in this proceeding. In any event, the District Court had applied dictum in *Steele* to a situation beyond the intention of that decision. This brief is designed to show that this is so by showing the implications of the District Court's holding.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT'S APPROACH WOULD PREVENT RATIONAL PROSECUTION DECISIONS IN SITUATIONS INVOLVING MASSIVE VIOLATIONS.

A. When limited prosecution resources are deployed against massive violations, there must of necessity be a choice in the order of prosecution. There is unlikely to be an unambiguous "best" approach, and indeed it is likely that every possible choice will be subject to some criticism.

Although voluntary compliance with the Military Selective Service Act has been the choice of the overwhelming majority of citizens, more than a half million non-registrants remain.[1] It would be irrational to attempt to allocate sufficient prosecution resources to prosecute all such offenders. Further, many non-registrants may have valid defenses, or prosecutions against them may be unproveable. In any event, some principle must be chosen for ordering prosecutions. If it is to be rational, that ordering principle should include consideration of the allocation of scarce resources to produce maximum results.

Ordering principles for allocating scarce resources to meet massive needs is discussed eloquently in G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (YALE 1978). For the most part, Calabresi and Bobbitt discuss the allocation of benefits or advantages (e.g., kidney machines or broadcast frequencies), although they indicate that the same issues are faced in allocating disabilities or disadvantages (specifically including obligations of military service). Various principles—including markets, modified or mixed markets, other methods of random selection, individual fitness, and evolutionary systems—may furnish the basis for decision. In many contexts, no system is unambiguously superior. For example, in allocating draft notices or kidney machines, selection by individual fitness is subject to the criticism that it violates the equal sanctity of individual lives, but a lottery—which ostensibly emphasizes equality—is subject to the criticism that it may produce more unable and unwilling soldiers, or allocate kidney machines to those who would benefit from them less.

The decision involved in the allocation of prosecution resources is philosophically and ethically similar. There is rarely an unambiguously "best" ordering principle. The choice of an ordering principle requires weighing of values that are not only intangible, but not commensurate with each other, and the function is particularly unsuited to judicial decisionmaking. *Cf. Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973).

B. An ordering that causes early prosecutions to be against those whose violations are most readily detectable, most flagrant, and most strongly proved by evidence may constitutionally be deemed preferable to other ordering principles, including the "random" allocation of prosecution resources.

The government's "passive" enforcement policy in this case caused the allocation of prosecution resources to those cases in which detection was caused by the defendant's own actions, and in which those actions themselves furnished evidence of the offense and showed it to be more flagrant than other offenses. This policy was rational. It is rational to allocate prosecution resources to those offenses for which evidence indicates the strongest likelihood of guilt and conviction. In addition, it is rational to allocate prosecution resources to cases in which deliberate or intentional violations are affirmatively shown. Finally, it is rational to allocate prosecution resources to those cases in which deterence is more likely to result. *E.g., United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978).

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1 See United States v. Eklund, No. 82-2505 (8th Cir., May 4, 1984), Slip op. at 2 (en banc decision upholding rejection of "selective prosecution" argument).

The trial judge, by implication, rejected such an approach. He indicated a preference for the "random" allocation of prosecutions. The dissent in the court of appeals adopted a similar approach.[2] Presumably, this approach would consist of collecting the names of all persons suspected to be violators, and the use of a wheel, computer-generated random number, lottery, or other random function to identify those to be prosecuted. While this is a possible method of allocating scarce resources, it is not unambiguously preferrble in the situation at hand, and there are good reasons for criticizing such an approach.[3]

First, the collection of the underlying information increases potential intrusions upon privacy. Names of possibly culpable non-registrants would have to be obtained from combining data obtained from other sources—social security records, internal revenue records, and the like. The invasion of privacy thus occasioned may not rise to constitutional proportions, but it is a value to be considered nevertheless. Further, when the government uses tax, social security, census or other records for law enforcement purposes, it runs the risk that it will induce non-compliance with the function whose records it is borrowing. For example, people will be less likely to pay income taxes if they believe the information is used for non-tax purposes. *See Using IRS for Non-Tax Purposes May Lead to More Tax Cheating*, Houston Chronicle, June 10, 1984, sec. 1, p. 18, col. 4 (N.Y. Times News Service).[4]

2 United States v. Wayte, No. 82-1699 (Ninth Cir., July 19, 1983), Slip op. at 3 (dissenting opinion of Judge Schroeder).

3 In addition, it was legally and factually impossible for the Government to use such a procedure here in a comprehensive way because it is undisputed that the law did not permit the use of matching data until after the decision was made here and, in any event, the technology did not exist. *See* Brief of Appellee, court of appeals, at 40.

4 One study, for example, showed that diversion of tax refunds to fulfill certain financial obligations caused a doubling, the next year, of failures to file tax returns. Id. Such diversion may be justified,

In this regard, the trial judge's preference for random prosecution was not only not subject to judicially cognizable standards; insofar as "matching" with social security or similar data is concerned, it is not currently subject even to clear *legislative* standards. A consultant's report to the Justice Department recently raises serious questions regarding the efficacy, disadvantages and cost of matching. *See* Houston Chronicle, Dec. 16, 1982, sec. 1, p. 1, col. 1. More importantly, the Senate is currently conducting hearings on the as-yet unknown privacy and voluntary compliance effects of such computer "matching." Senator William S. Cohen, Chairman of the Oversight Subcommittee of the Senate Committee on Government Affairs, opened the hearings with the statement:

> Computer matching offers an excellent opportunity for the government to crack down on waste and fraud. But there must be proper safeguards to protect against an unwarranted invasion of privacy. I am hopeful that these hearings will provide an opportunity to discuss what the proper balance between these two concerns should be.

Id. Later, Senator Cohen concluded that the evidence showed that matching "actually may be reducing the number of Americans who voluntarily comply with the nation's tax laws." *Id.*, June 10, 1984, sec. 1, p. 18, col. 4.[5] The district court resolved

but it should not be undertaken without awareness of harm to the other government function—here, tax collection—and the harm to individual privacy. In the latter regard, more than half of taxpayers erroneously believe that IRS freely shares their tax returns with other agencies. Id. Neither the district court nor the dissent in the court of appeals recognized these disadvantages.

5 These examples apply to income tax information, but similar distortions in other government functions could be expected if citizens were discouraged from identifying themselves by social security number, driver's license, or other means. In addition, each use of

"these concerns" without the benefit of such "discussion," and by doing so it went far beyond judicial functions.

A more fundamental criticism of the "random" prosecution idea is that it takes no account of individual fitness for prosecution. Allocation of the sanctions of the criminal law in accordance with individual culpability is an important value in the criminal law. A "random" approach would select for prosecution those whose violations were less flagrant and, therefore, not as culpable as those identified through the government's "passive" enforcement policy. A random approach would almost certainly identify violators against whom there was less evidence of guilt, and it would not allocate prosecution resources so as to derive maximum deterrence.[6] But the real point is that the decision whether to use a random system, or a policy such as that adopted by the government here, is entrusted in our system to executive discretion and is not a judicial function.

C. When the statements of an individual lead to detection of his offense, provide evidence of the offense, and show the offense to be flagrant and deliberate, it is not a violation of the First Amendment to take this evidence into account.

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such information may erode confidence in the confidentiality of tax information because citizens tend to view government as a unified entity.

Petitioner may argue that driver's license records were available and should have been used. But invasion of these confidential records may well involve the same disadvantages. Thus California recently refused to release driver's license records for use in the important function of voter registration, and the refusal has been upheld at the Superior Court level. See Houston Chronicle, July 29, 1984, sec. 1, at 6, col. 1 (United Press Int'l). The trial court reasoned that "drivers would be upset to learn that information they had to disclose in order to obtain licenses could be distributed to anyone who asked for it." Id.

6 None of these comments should be taken as showing that a random approach would be improper; it would have certain advantages to offset these disadvantages and could rationally be preferred.

Presumably, there is a protected First Amendment right to utter or even publish incriminating statements about oneself. The First Amendment does not provide any concomitant right, however, to prevent use of those incriminating statements. At the extreme, there is probably a First Amendment right to utter a confession of crime, but there is no First Amendment right to avoid its admittance into evidence. *See United States v. Stout*, 601 F.2d 325, 328 (7th Cir. 1979).

Similarly, there is no First Amendment right to avoid proof of culpability if evidence shows an accused to have been particularly culpable of a violation—to have committed it deliberately, to have committed it in an intentional effort to inflict the consequences upon a victim or upon the government, or to have induced others to engage in violations. For example, it is widely agreed that the leader of a criminal enterprise is more culpable, and should be more readily subject to prosecution and more severely sentenced than persons who follow his directions. However, the very essence of "leadership" is expression. The leader of a criminal endeavor is identified by his communications to followers. The communicative nature of the utterance does not prevent its use in the criminal justice system to show more serious culpability.[7] *Cf. United States v. Varini*, 435 F.2d 758, 762 (6th Cir. 1960).

The distinction between expression as political discussion and expression that provides evidence of, or constitutes, or aggravates the offense, has been recognized by the courts not only in this context, but in others as well. For example, in *Megill v. Board of Regents*, 541 F.2d 1073 (5th Cir. 1976), the appellant claimed that the Florida Board of Regents had denied him tenure on the basis of his expression. The Regents had con-

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7 Furthermore, a great many offenders are detected by utterances they make to friends, relatives or informants. The fact that an offender has talked about his violation to another person, and that the expression has led to his detection, does not make a prosecution instituted against him improper.

sidered his expression, but they had done so for the purpose of determining the underlying character traits that his expression evidenced, and these character traits made him unsuitable for employment. In other words, they had used the expression for evidentiary purposes, just as happened here. *Cf. Garza v. Rodriguez*, 559 F.2d 259, 260 (5th Cir. 1977, *cert. denied* 439 U.S. 877 (1978) (citing *Megill* for the proposition that a person cannot "claim First Amendment protection for speech used against him not because of the speech itself, but because [of what] the speech evidences . . . ."). The courts have repeatedly shown that they are readily able to draw this distinction. [8]

By its passive enforcement policy, the government was not likely to identify for prosecution persons who merely engaged in speech against the Military Selective Service Act. If the government's approach had been to identify persons engaged in political discussion, and then to determine whether those persons were subject to the Selective Service Act and had deliberately refused to register, a different case would be presented. But the essence of the passive enforcement program was to allow those persons who furnished evidence of the deliberateness of their violation to self-select. No principle or case holds that a person whose "vocalness" consists only in furnishing a confession of the deliberateness of his violation can prevent the use of that evidence.

II. THE DISTRICT COURT'S APPROACH WOULD LEAD TO DEEP JUDICIAL INTERVENTION IN LEGITIMATE PROSECUTION FUNCTIONS FOR WHICH THERE ARE NO COGNIZABLE JUDICIAL STANDARDS, AND IT WOULD INFRINGE UPON THE SEPARATION OF POWERS.

8 Cf. Linsey v. Board of Regents, 607 F.2d 672 (5th Cir. 1979) (termination of employment based solely upon disagreement with content of speech, where speech did not evidence any wrongdoing or undesirable character, held unconstitutional). See also United States v. Street, supra; United States v. Varini, supra.

The District Judge's preference for a "random" selection principle, rather than the government's policy in this case, necessarily puts the judiciary in the position of weighing conflicting values, deciding the weight of advantages and disadvantages that are not commensurate with each other, and making decisions for which there are no cognizable judicial standards. *Cf. United States v. Newman*, *supra*. It is for this reason that discretion in initiating prosecutions is entrusted to the executive branch. Furthermore, the approach of the trial judge was calculated to maximize judicial intervention in, and distortion of, executive decisionmaking in this area.

For example, the District Judge's reasoning focussed heavily upon discovery of law enforcement documents that are ordinarily confidential. There is good reason for such confidentiality. Documents describing detection and enforcement policies nearly always provide information that would allow violators to structure their conduct so as to avoid detection or proof.

In addition, the District Court found it appropriate to indicate that participation by a presidential advisor in the initiation of law enforcement policy somehow "crow[ed] . . . a strong inference of impropriety." It is simply not improper for the office of the President of the United States to be involved in the initiation of decisions that are entrusted to the executive branch.[8a]

Finally, the District Court's focus upon the letter of Senior Legal Adviser Kline to Selective Service, recognizing potential First Amendment problems that might lead to selective prose-

8a As the en banc Eighth Circuit said, "Surely it is not remarkable that high-ranking executive officials participated in formulating a policy for enforcement of laws pertaining to national security interests and involving hundreds of thousands of offenders, especially since it was contemplated that other executive agencies, specifically the IRS and the Social Security Administration, would become involved in the enforcement process." United States v. Eklund, supra note 1, slip op. at 14.

cution claims, could distort future discussions of law enforcement policy. Law enforcement decisions often involve the charting of a course that avoids various problems, and recognition and discussion of such problems is a necessary first step. The District Court's use of this discussion of avoiding violation of the First Amendment as evidence against the government's policy will discourage complete discussion in the future, even if it identifies and helps to avoid infringement of individual rights or interests.[9]

But the more fundamental difficulty with the approach of the trial judge is that, in any situation involving widespread violation of law because of disagreement with it, proper prosecution decisions will inevitably lead to claims of selective prosecution. These claims, in the approach of the District Court, will in every such case cause these same kinds of invasions of confidential government records, judicial evaluations of executive organization and personnel, and distortion of the executive function. The most rational approach may be to prosecute those whose violation of the law is most flagrant, but the approach of the district court reveals that such persons will nearly always be able to make a prima facie case that they are engaged in expression. In fact, their violations themselves are civil disobedience, which is a type of "expression," though obviously not protected by the First Amendment from prosecution. Thus under the approach of the District Court, massive violations in the form of civil disobedience will lead almost inevitably to the sort of deep intrusion into the executive function that is illustrated here.

9 To put the matter differently, there may be, and probably were, Justice Department memoranda discussing other selection principles and the difficulties that they would pose, such as the possible infringement of privacy interests and discouragement of compliance that would occur if tax, social security or other records were used to identify violators. Internal government identification and discussion of a policy should not be used as evidence that the adoption of that policy was improper, because such discussion may well lead to sensitivity toward, mitigation of, or avoidance of the problem.

The District Judge's error consists in interpreting concern for the "vocal" offender as elevating the law-violation component of civil disobedience to a status of protection against prosecution. Invocation of the principle of civil disobedience is not, and cannot rationally be made, a defense to prosecution. Indeed, in true cases of civil disobedience, the offender seeks to publicize his violation, to make it flagrant and deliberate, to invite the sanctions of the law against himself,[10] and, by the acceptance of responsibility, conviction and sentence, to call public attention to his view of the law. Even moral philosophers who justify civil disobedience are virtually uniform in emphasizing that it cannot furnish a *legal* justification. *See* Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507, 508 (1965); *see also* PLATO, *Crito*, in THE PHILOSOPHY OF PLATO 91 (Edman ed. 1956); Lutheran Church in America, Statement on Race Relations, July 9, 1964. Reference in the cases to the "vocal" resister cannot mean that the offender is exonerated merely because his "vocalness" consists in brazenly advertising public evidence of his deliberateness in committing a criminal offense.[11]

CONCLUSION

The District Court's approach would prevent effective prosecution response to massive violations of law. Because prosecution resources are limited, there must be a choice as to the order of prosecutions in such instances. Virtually all such choices have advantages and disadvantages. The policy adopted by the government in this case had several significant advantages, in that it tended to identify deliberate offenders against whom ample evidence was likely to exist, whose offenses were likely to

10 Presumably, this is what Wayte had in mind when he wrote that he "accepted the consequences" in his incriminating letters. However, he did not do so when the prosecution was initiated.

11 To do so would be to elevate civil disobedience into a legal defense and to protect violation of law based upon mere disagreement with law.

be more culpable than the average offender, and whose prosecution would provide the best deterrence benefits.

The random selection method preferred by the District Judge, although rational and constitutional, has a number of disadvantages, including invasion of privacy interests, use of government data collected for other purposes so as to arouse suspicion and discourage compliance, failure to tailor prosecution to individual culpability, and selection of less flagrant violators. Furthermore, the approach of the District Court required deep intrusion in legitimate prosecution decisionmaking, is likely to require similar intervention in any case involving massive violations or civil disobedience, and requires judicial decisionmaking in an area particularly unsuited to judicial standards.

The decision of the Court of Appeals should be affirmed and the prosecution reinstated.

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OCTOBER TERM, 1984

DAVID ALAN WAYTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether petitioner, who volunteered to the government that he had violated the Military Selective Service Act, was impermissibly selected for prosecution under a "passive enforcement" system on the basis of his exercise of First Amendment rights.

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28 U.S.C. 533 19
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Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) 32, 43, 45

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Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 Colum. L. Rev. 144 (1984) 37, 53-54

Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 490 (1952) 32

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1292

DAVID ALAN WAYTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals is reported at 710 F.2d 1385. The opinion of the district court is reported at 549 F. Supp. 1376.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1983. A petition for rehearing was denied on November 4, 1983. The petition for a writ of certiorari was filed, pursuant to an extension, on February 2, 1984, and was granted, limited to the first question presented, on May 29, 1984 (J.A. 3). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

On July 22, 1982, petitioner was indicted in the Central District of California for knowingly refusing to register with the Selective Service as required by law, in violation of 50 U.S.C. App. (& Supp. V) 453 and 462(a). On November 15, 1982, the district court dismissed the indictment on the ground that petitioner had been im-

permissibly selected for prosecution (Pet. App. A21-A33, A47). The court of appeals reversed (*id.* at A9-A11).

A. The Registration Program, The "Passive Enforcement" System, And The Prosecution Of Petitioner

1. On July 2, 1980, President Carter, acting pursuant to the Military Selective Service Act (50 U.S.C. App. (Supp. V) 453), issued Proclamation No. 4771, 45 Fed. Reg. 45247 (1980). The Proclamation directed all males residing in the United States who were born in 1960 to register with the Selective Service System during the week of July 21, 1980, by filling out a registration form at a local post office. In signing the Proclamation, the President stated that he was "deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union." He explained that registration would "expedite[] the process by which, if our Nation enters a time of emergency or a threat to our national security or a time of war in the future, the marshaling of our defense mechanisms can be expedited." The President also "emphasize[d] that the registration act is not a draft * * *. [S]eparate legal action would be required by Congress * * * to initiate a draft * * *." 16 Weekly Comp. Pres. Doc. 1274, 1274-1275 (July 2, 1980).

Petitioner, then a 20-year-old college student, was required to register under the Presidential Proclamation but did not do so. Instead, on August 4, 1980, he wrote Selective Service informing it: "I have not registered for the draft. I plan never to register. I realize the possible consequences of my actions, and I accept them" (J.A. 716). On the same day, petitioner sent a letter to President Carter stating that he had made "the decision to consciously and willfully break a law of my country. * * * * * I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft" (J.A. 713-714). Six months later, petitioner sent a second letter to Selective Service (J.A. 710):

> Last August I wrote to inform you of my intention not to register for the draft. Well, I did not register, am[d] still plan never to do so, but thus far I have received no reply to my letter, much less any news about your much-threatened prosecutions.
>
> I must interpret your silence as meaning that you are too busy or disorganized to respond to letters or to keep track of us draft-age youth. So I will keep you posted of my whereabouts.

Petitioner also stated that, although he would "be travelling the nation * * * encouraging resistance and spreading the word about peace and disarmament," he could be reached at his designated home address in Pasadena, California (J.A. 710-711).

2. Shortly after the initiation of the registration program in July 1980, the government began to receive letters and telephone calls from people who stated that either they or persons known to them had not registered as required by law. In order to process this information, Selective Service developed the "passive enforcement" system. Under this system, Selective Service did not actively seek to identify nonregistrants, but instead directed initial enforcement efforts at people who came to the government's attention as possible violators either through their own communications or those of third parties. J.A. 628-633, 658-659. Third-party reports were an integral feature of the "passive enforcement" system and accounted for more than one-half of all of the names of possible nonregistrants that were conveyed to the government (J.A. 631, 679-685). Such reports could come from a wide range of people, including parents, friends, and neighbors of the nonregistrant as well as other concerned citizens, and could reflect a variety of reasons: patriotic citizens who were aware of someone's nonregistration; parents who were disappointed at a son's refusal to comply with the law; people whose own son had registered and did not want to permit someone else to avoid the same obligation; or those motivated by personal considerations such as spite or revenge.[1]

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[1] See J.A. 284, 286, 597, 554; *Selective Service Prosecutions: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties,*

As part of the "passive enforcement" system, Selective Service sent a letter by certified mail to each reported violator who it verified had not registered and for whom it had a mailing address. The letter explained the duty to register, stated that Selective Service had information that the person was required to register but had not done so, requested that he either comply with the law by filling out an enclosed registration card or explain why he was not subject to registration, and warned that a violation could result in criminal prosecution and specified penalties (J.A. 639-640, 737-741). On June 17, 1981, this letter was sent to the first group of people who had been identified as possible nonregistrants (J.A. 646). Petitioner received a copy of the letter but did not respond (J.A. 642-643, 645, 734).

On July 20, 1981, Selective Service transmitted to the Department of Justice, for further investigation and potential prosecution, the names of petitioner and 133 other possible nonregistrants identified under the "passive enforcement" system, all of whom had not registered in response to the above letter from the Service. J.A. 646-648, 690-692. After screening out individuals who appeared not to be in the class required to register, David J. Kline, the attorney in the Criminal Division of the Department responsible for supervising enforcement of the Selective Service laws, referred the remaining names to the Federal Bureau of Investigation for additional inquiry and to the United States Attorneys for the districts where the nonregistrants resided (J.A. 692-695). Petitioner was among the people so referred (J.A. 692).

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and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 17, 19 (1982) [hereinafter cited as *Oversight Hearing*]; *Department of Housing and Urban Development—Independent Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. 586 (1983) [hereinafter cited as *1984 House Appropriations Hearings*]; *Department of Housing and Urban Development—Independent Agencies Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 2d Sess. 216 (1982) [hereinafter cited as *1983 House Appropriations Hearings*].

In formulating its enforcement plans, the Department concluded that "the primary goal of any prosecution policy must be to encourage and to facilitate registration" (J.A. 225). The Department believed that, by "adopt[ing] a posture of viewing the failure to register as a serious matter, * * * [it would] further encourag[e] registration" (J.A. 220). Thus, "an initial round of well publicized successful prosecutions should have a dramatic effect in further reducing the number of non-registrants" (J.A. 272). By bringing prosecutions, the government sought to demonstrate that it viewed nonregistration to be a serious offense and that it intended to enforce the law by criminal sanctions if necessary. See J.A. 649; see also *1983 House Appropriations Hearings* 212.

In light of its objective to encourage registration, the Department adopted a policy of leniency under which it would seek to obtain voluntary (albeit late) compliance by the nonregistrant as an alternative to prosecution. Pursuant to this so-called "beg" policy,[*] the appropriate United States Attorney was required to notify identified nonregistrants by registered mail that, unless they registered within a specified time, prosecution would be considered (J.A. 771). In addition, an FBI agent generally was sent to interview the person before prosecution was commenced (J.A. 257, 270, 360, 389).

The "beg" policy was intended to afford nonregistrants a last opportunity to register in order to prevent prosecution, and it reflected the fact that the Department was "trying to do everything we can to avoid prosecution unless we're forced into it" (J.A. 791). Thus, the effect of the policy was "to ensure that * * * [a defendant's] refusal to register is willful" and that "only the persons who are most adamant in their refusal to register will be prosecuted" (J.A. 389-390; see also J.A. 646). Any person who registered under the "beg" policy would not be prosecuted; conversely, prosecutions were brought against

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[*] Kline explained that this was called the "beg" policy because the Department chose "to beg people to register before [it] prosecuted them" (J.A. 771).

every identified nonregistrant who refused to comply (J.A. 255, 257, 271, 291, 775-776, 782-785, 792). Pursuant to the "beg" policy, on October 15, 1981, the United States Attorney for the Central District of California sent petitioner a letter urging him to register or face possible prosecution (J.A. 723-724). Once again, petitioner failed to respond.

In December 1981, the Criminal Division instructed United States Attorneys to suspend efforts to seek indictments in nonregistration cases. Thereafter, on January 7, 1982, President Reagan announced a grace period to allow nonregistrants to register without penalty. This grace period continued until February 28, 1982. J.A. 263-268, 697, 814.

In March 1982, the Department decided to go forward with prosecutions of those people who, despite the grace period and the "beg" policy, persisted in their refusal to register. It recognized that, under the "passive enforcement" system, the defendants were "liable to be moral proponents of nonregistration * * * [or people] with religious or moral objections" (J.A. 301), and that prosecutions would "undoubtedly result in allegations that the [case was] brought in retribution for the nonregistrant's exercise of his first amendment rights" (ibid.).* However, the Department was advised that

* The Department recognized that, under the "passive enforcement" system, "the first prosecutions are liable to consist of a large number of (1) persons who object [to registration] on religious and moral grounds and (2) persons who publicly refuse to register" (J.A. 336). This principally reflected two considerations: that such people were the most likely, first, to report their nonregistration to the government and, second, to persist in their refusal to register and decline the opportunity to avoid prosecution under the "beg" policy. The government also realized that these defendants "are liable to raise thorny selective prosecution claims" (ibid.) and that such a defense, if successful, would adversely affect the objective of the prosecutions to establish a general deterrent to crime to enhance compliance with the registration requirement (J.A. 336). The Department therefore thought that it would be desirable for an "active enforcement" system to be designed to replace the "passive" system (J.A. 336).

Selective Service's effort to develop a more "active" enforcement system (discussed at pages 7-10, *infra*) would not be completed for some time (J.A. 299-300, 303). In these circumstances, the Department decided against further delay in the commencement of prosecutions (J.A. 302-303):

> [W]e cannot recommend putting the "passives" on hold until the "actives" are referred. We are precluded from doing so by one factor—time. If the Department of Justice waits until late this year to institute prosecutions of non-registrants, the registration scheme will suffer greatly. Consequently, we reluctantly conclude that United States Attorneys should be directed to proceed to prosecution with the matters which have already been referred to them.

In June 1982, after the results of registration during the grace period had been determined (J.A. 823), the Department notified United States Attorneys to proceed with nonregistration prosecutions (J.A. 698-700). The Assistant Attorney General for the Criminal Division advised United States Attorneys that "any significant delay in instituting prosecutions will impact adversely on the registration scheme and result in an increase in numbers of persons who refuse to register. Consequently, * * * such matters * * * [should be] handled on a priority basis" (J.A. 330-331). See also J.A. 814, 840. Following an interview by FBI agents (J.A. 726-731), petitioner continued to refuse to register. Accordingly, on July 22, 1982, an indictment was returned against him for knowingly failing to register with the Selective Service as required by law (J.A. 1-2).

B. Development Of An "Active Enforcement" System

The "passive enforcement" system was instituted as the initial compliance method "because [it] was the only system for which Selective Service had authority or resources" (J.A. 652-653; see page 13, *infra*). However, even before the first referrals of possible violators (including petitioner) were made to the Department of

Justice under the "passive" system in July 1981, Selective Service was seeking to establish a more "active" system for identifying nonregistrants; at least as early as May 1981, the Service was in the process of developing an "active enforcement" method. See J.A. 233, 488. Any such system was to be based on a comparison of Selective Service registration lists with records that contained birthdates identifying people of the age subject to registration. The Department of Justice strongly supported and encouraged the development of such a system. See J.A. 292, 302, 766, 811-813, 877, 900-912. In the end, though, the creation of a more "active" system proved to be a difficult and time-consuming endeavor.

From the beginning, Social Security records were thought to offer the best data for an "active enforcement" system. However, in November 1980, a federal court ruled that under the Privacy Act (5 U.S.C. 552a) Selective Service could not require registrants to provide their Social Security number, and it enjoined the Service to delete the request for this information and to eliminate Social Security numbers from its existing records. See *Wolman* v. *Selective Service System*, 501 F. Supp. 310 (D.D.C. 1980). This decision raised serious problems for Selective Service's efforts to develop an "active" system. See J.A. 653. In December 1981, Congress enacted legislation to overturn the decision by authorizing the President to require a registrant to submit his Social Security number and to direct the Social Security Administration to provide pertinent information to Selective Service. See Pub. L. No. 97-86, § 916(c), 95 Stat. 1129, 50 U.S.C. App. (Supp. V) 462(c); H.R. Conf. Rep. 97-311, 97th Cong., 1st Sess. 129 (1981); H.R. Rep. 97-71, 97th Cong., 1st Sess. 160-161 (1981).[4] In March 1982, presidential authorization was given under the statute for Selective Service to obtain data from Social Security records. See J.A. 309-310, 606, 658.

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[4] In light of the statute, the court of appeals remanded *Wolman* to the district court for further consideration (675 F.2d 1341 (D.C. Cir.) (Table)), and the district court vacated its earlier judgment (542 F. Supp. 84 (D.D.C. 1982)).

By March 1982, Selective Service had developed a computer matching program to identify nonregistrants (J.A. 586, 606). Over the next few months, the Service worked out arrangements with Social Security for transfer of the necessary computer data (J.A. 298-299, 495-496, 600, 602, 606-608). However, after suspected nonregistrants were identified by computer cross-matching, it was found that the computerized Social Security records did not include complete address information and that the manual files often contained obsolete addresses. Efforts to obtain current addresses from the Internal Revenue Service failed because IRS concluded that it was barred from disclosing such information by 26 U.S.C. 6103.[5]

Faced with this difficulty, Selective Service turned to other data bases for identifying nonregistrants. In particular, it considered the use of state driver's license lists. See 47 Fed. Reg. 55445 (1982). This alternative had previously been rejected because it was less desirable than Social Security records for establishing a comprehensive and equitable enforcement system: first, this information was not available from all states; and second, not all people who were required to register for the draft had a driver's license.[6] When the use of Social Security records proved inadequate, however, Selective Service reconsidered the matter and decided to use the state information as part of the basis for implementing a feasible "active" system.[7]

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[5] IRS did send notices to identified nonregistrants requesting that they comply with the law. Where no response was received, however, Selective Service was unable to proceed further because it could not locate the individual.

[6] See J.A. 292 n.3, 548-549, 567-568, 571-572, 805, 911-912; see also *Oversight Hearing* 74; *1984 House Appropriations Hearings* 581; *1983 House Appropriations Hearings* 208.

[7] See *1984 House Appropriations Hearings* 607; *Department of Housing and Urban Development, and Certain Independent Agencies Appropriations For Fiscal Year 1984: Hearings on H.R. 3133 Before the Senate Comm. on Appropriations*, 98th Cong., 1st Sess. 48-49 (1983) [hereinafter cited as *1984 Senate Appropriations Hearings*].

Since early 1983, Selective Service has employed an "active enforcement" system to identify and locate nonregistrants.[8] This system utilizes Social Security records and state driver's license lists, as well as information from other federal and state sources. A suspected nonregistrant is notified at least twice by letter of his duty to register; if he refuses to comply, Selective Service refers his name to the Department of Justice for investigation and possible prosecution. We are advised that, as of June 1984, a total of more than 160,000 names have been transmitted to the Department under the "active" system, and that 599 of these people have been selected at random for further investigation; to date, all such people who were subject to the registration requirement have elected to comply pursuant to the "beg" policy, and thus no prosecutions have been instituted.

C. Proceedings In This Case

1. Petitioner moved to dismiss the indictment on the ground of selective prosecution. He requested an evidentiary hearing on the motion and sought to subpoena Presidential Counsellor Edwin Meese III, Secretary of Defense Caspar Weinberger, Selective Service Director Thomas Turnage, and Assistant Attorney General D. Lowell Jensen. He also requested production of internal documents of the Selective Service System, the Department of Justice, the Presidential Military Manpower Task Force, and the White House Staff. Petitioner contended that he and the other 12 defendants who had been indicted were "vocal" opponents of the registration program and that, out of an estimated 500,000 nonregistrants, they had been impermissibly targeted for prosecution on the basis of their exercise of First Amendment rights. In making this claim, petitioner relied on a

[8] See Semiannual Report of the Director of Selective Service for the Period Oct. 1, 1983-Mar. 31, 1984, at 3; Semiannual Report of the Director of Selective Service for the Period Apr. 1, 1983-Sept. 30, 1983, at 5, 12; S. Rep. 98-506, 98th Cong., 2d Sess. 82 (1984); *1984 Senate Appropriations Hearings* 48-49.

number of internal Department of Justice memoranda that had previously been disclosed in other litigation.

The district court granted petitioner's request for discovery. In particular, it ordered the government to furnish petitioner not only with copies of Selective Service and Department of Justice documents concerning the prosecution of nonregistrants, but also to disclose materials relating to the Selective Service program from the Presidential Military Manpower Task Force, the White House Staff, and the Department of Defense (10/1/82 Tr. 23-25). The government turned over all relevant Justice Department and Selective Service documents but sought reconsideration of the remainder of the discovery order. In support of reconsideration, the government submitted affidavits from Selective Service Director Turnage, Assistant Attorney General Jensen, and Criminal Division Attorney Kline. The district court denied the request for reconsideration (10/5/82 Tr. 40).

On October 7, 1982, the district court conducted an evidentiary hearing. At the hearing, Kline testified at length about the formulation of prosecution policy in nonregistration cases.[9] He explained that the overriding objective had been to foster compliance with the registration law by attempting to induce people to register. Kline emphasized that the Division's approach involved "absolutely no intention to single out vocal nonregistrants in order to deter them from exercising their First Amendment rights," and that "[t]he idea was to avoid the problems, not to engage in any kind of selective prosecution" (J.A. 778).[10] He also testified that, although he

[9] The government also introduced copies of all documents generated within the Department—including internal memoranda, policy statements, and preliminary drafts—that were pertinent to the development of the prosecution policy.

[10] Kline testified that his memoranda had "tried to alert [his superiors] to possible problems" (J.A. 778) but that "[h]ad I ever thought that we were dealing with an unconstitutional scheme I would have done my maximum to * * * shut down the system and you would be reading wads of documents that say this is what my belief is" (J.A. 802-803). See also J.A. 926-927.

believed the Department's prosecution policy to be constitutionally sound, he had sought adoption of a more comprehensive scheme for identifying nonregistrants and selecting them for prosecution in order to enhance overall compliance with the registration law and to avoid selective prosecution claims; and in that regard he pointed to the development of the "active enforcement" policy and the difficulties and delays that had been encountered (J.A. 766, 796-805). Finally, Kline testified that he had handled petitioner's case like those of all other alleged nonregistrants and that petitioner had not been singled out for exercising his First Amendment rights but instead had been investigated and prosecuted because he had violated the law (J.A. 782, 794-796, 788, 852).

The government also submitted affidavits from Kline and from Edward A. Frankle, who was responsible for the development and implementation of Selective Service's registration compliance program. Kline made clear that he reviewed the files transmitted from Selective Service, including that of petitioner, to determine whether the person was required to register (J.A. 528E, 528H) and that petitioner and the other nonregistrants were referred to the FBI and United States Attorney "for no reason other than it appeared that [they] had violated federal law by failing to register with the Selective Service System" (J.A. 528M). Kline also stated that he had no information regarding petitioner beyond what was contained in the Selective Service file (*ibid.*) and that petitioner was treated no differently from others (J.A. 528L). Frankle likewise explained that he had handled petitioner's case like that of everyone else and that, apart from the letters petitioner had sent to the government, he had no knowledge of any activities in opposition to registration in which petitioner might have engaged (J.A. 633, 637-638, 649, 650). Thus, petitioner "was not referred for possible prosecution because of any anti-draft or political activities. He was referred simply because he offered his name to the attention of the Selective Service and upon investigation by letter, it became apparent that he was most probably in violation of the

* * * Act" (J.A. 630-631). More generally, Frankle stated that the "passive enforcement" system was directed to people who were reported to the government—either by themselves or by third-parties—to be nonregistrants and that accordingly he had not processed (J.A. 635):

> several letters written by individuals who declared their opposition to the decision to resume registration but which did not indicate that the individual opposed to registration was of the age required to register.

Finally, Frankle described the development of the "active enforcement" system (J.A. 653) and explained that the "passive" system had been implemented because "at the time * * * it was * * * the only system for which Selective Service had authority and resources. * * * [The 'active'] system was not initiated sooner solely because of lack of time, authority and resources" (J.A. 652-654).

Despite this extensive evidence, and notwithstanding a formal declaration of privilege executed by the White House Chief of Staff, the district court, based on its in camera review, required the production of documents from the Presidential Military Manpower Task Force and the White House Staff and directed that Moore, Jensen, and Turnage be made available to testify (10/15/92 Tr. 37-40; 10/28/92 Tr. 4-6; C.A. Excerpt of Record 1179). The government respectfully declined to comply and suggested that the court dismiss the indictment in order to allow an appeal to be pursued with respect to the validity of the sweeping discovery ordered by the court.

2. On November 15, 1992, the district court dismissed the indictment on the ground of selective prosecution (Pet. App. A19-A47). It held that petitioner had made a prima facie case that he and the other nonregistration defendants were "vocal" opponents of the registration program and that they had been singled out for prosecution under the "passive enforcement" system on the basis of their First Amendment rights. In addition, the court concluded that the government had failed to rebut this

showing of selective prosecution. Accordingly, the court ruled that the prosecution violated petitioner's right to equal protection.

3. The court of appeals reversed (Pet. App. A7-A17). It held that petitioner had not shown that the government focused its investigation on him because of First Amendment activities. It also found that the government had justified its prosecution policy on neutral and legitimate grounds and that an "active enforcement" system was being established. Finally, the court concluded that, since petitioner had not made a sufficient initial showing of selective prosecution, the government's refusal to comply with the discovery orders was not improper. Judge Schroeder dissented.

SUMMARY OF ARGUMENT

1. Under settled principles, a prosecutor has broad discretion in initiating a criminal case and, unless motivated by impermissible considerations, the exercise of that discretion is not subject to judicial review. The doctrine of prosecutorial discretion rests on both constitutional separation-of-powers principles and the practical administration of the criminal justice system.

To establish the defense of selective prosecution under traditional equal-protection standards, the defendant must show that he was singled out for prosecution from among others similarly situated and that such discrimination was based on improper factors such as race or the exercise of constitutional rights. Petitioner's challenge to the "passive enforcement" system does not satisfy either prong of this two-part test.

a. Petitioner has failed to prove discrimination against nonregistrants who exercised their First Amendment right to protest the registration requirement. First, under the "passive enforcement" system, more than 1000 people were reported to Selective Service as possible violators; only those who were required to register but refused to do so were prosecuted. By focusing on the category of eventual defendants rather than the category of reported violators, petitioner has misconceived the relevant universe for determining whether the "passive" system discriminated against "vocal" nonregistrants.

In any event, even under petitioner's approach, there has been no showing of discrimination. While petitioner and others prosecuted pursuant to the start-up "passive enforcement" policy may be more "vocal" than a randomly selected group of nonregistrants, they all share one salient characteristic that other nonregistrants do not and that is an entirely proper basis for selecting them for prosecution—they were known to Selective Service as probable violators of the registration law. Accordingly, because the government prosecuted all known nonregistrants, it is not the case that petitioner was chosen for prosecution while other people similarly situated were not.

Other considerations also confirm that the government did not discriminate among nonregistrants on First Amendment grounds. The government investigated all reported nonregistrants, and prosecuted all who were required to register but refused to do so, without regard to their exercise of First Amendment rights. At the same time, no one who engaged in protests of draft registration, but who was not reported to the government as a violator, was investigated or prosecuted. And all reported nonregistrants—including public opponents of registration—were given the opportunity to avoid prosecution by registering under the lenient "late" policy. Taken together, these considerations belie petitioner's contention that the government discriminated against "vocal" nonregistrants and demonstrate that he has not presented a sufficient basis to justify judicial inquiry into the process of prosecutorial decisionmaking. In essence, petitioner selected himself for prosecution by reporting his violation to the government and persisting in his refusal to register despite repeated chances to comply with the law.

b. In addition, petitioner has not shown that his prosecution under the "passive enforcement" system was deliberately based upon an unjustified standard or motivated by improper factors.

Initially, we submit that First Amendment values are simply not implicated in this case. The sole consideration in pursuing an investigation and possible prosecution was that the person had been reported to the government, either by himself or by a third-party, to be a nonregistrant; neither the fact nor the content of any protest against registration was relevant. Indeed, the provision for third-party reporting plainly indicates that the enforcement system was not based on the nonregistrant's exercise of his constitutional right to oppose government policy; such reports did not involve a nonregistrant's right to complain to the government about the registration requirement, and third parties could learn of a nonregistrant's violation in many ways that were entirely unrelated to any public protest in which he might have engaged. Moreover, even in instances of self-reported violations, a nonregistrant's admission to the government that he had committed a crime is not itself protected by the First Amendment, and therefore it was proper to base his prosecution on such a confession. Finally, even the most visible nonregistrant could avoid prosecution merely by registering under the "late" policy. Thus, nonregistrants were completely free to exercise their constitutional rights and, at the same time, would not be indicted for their violation of the Selective Service Act if they complied (albeit late) with the registration requirement. Since, as petitioner concedes, the First Amendment does not afford a privilege to refuse to register, the "passive enforcement" system burdened no constitutional right; the only freedom denied petitioner was that of continuing to violate the law.

Furthermore, to the extent that their First Amendment rights were implicated, "vocal" nonregistrants were not impermissibly selected for prosecution on the basis of constitutionally protected activity. On the contrary, the "passive enforcement" system served legitimate governmental purposes and did not constitute an attempt to repress opposition to registration. First, by relying on reports of nonregistration, the system allowed the government to identify violators and bring prosecutions with a

minimal expenditure of its limited resources. It also enabled the government to prosecute those cases that were the strongest because the defendant's confession of a violation provided clear evidence of his knowing and persistent refusal to register. In addition, prosecution of "vocal" offenders promoted general deterrence and prevented the possibility that the failure to proceed against a publicly known offender would encourage others to disobey the law. Lastly, the government could properly consider the flagrancy of the violation of those who announced their refusal to register and declined repeated opportunities to come into compliance under the "late" policy. Petitioner's challenges to these evident justifications for the "passive enforcement" system represent no more than an attempt to second-guess the wisdom of the Executive's policy and do not establish the defense of selective prosecution. And the absence of governmental bad faith is made especially clear here by the fact that the "passive" system was simply an initial enforcement method and remained in effect only until a suitable "active" system could be developed and implemented.

2. Petitioner no longer relies, as he did below, on the traditional equal-protection standard for selective prosecution. Instead, he now contends that his prosecution directly violated the First Amendment. We submit, however, that this contention is without merit under a correct First Amendment analysis and that, in general, claims like petitioner's are properly analyzed under the traditional selective-prosecution test and do not require a separate First Amendment inquiry.

For the reasons stated above, the First Amendment is not implicated in this case. The "passive enforcement" system was based upon reports of nonregistration, not constitutionally protected activities, and whether or how a nonregistrant exercised his First Amendment rights was simply immaterial. Additionally, pursuant to the "late" policy, a nonregistrant could avoid prosecution merely by complying with his duty to register, regardless of anything he may have said previously or might wish to say in the future; nonregistrants were and remain en-

tirely free to exercise their constitutional rights without restriction and would be restrained by the prospect of prosecution only from persisting in their violation of the law.

At all events, because the "passive enforcement" policy served governmental interests that were unrelated to the suppression of constitutional rights, the proper First Amendment standard for reviewing any incidental effect on protected activity is that set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Because this exercise of prosecutorial discretion furthered substantial governmental interests and was not overbroad in relation to those interests, the *O'Brien* test is satisfied.

More generally, where there is no showing of impermissible motivation to suppress protected speech under the traditional selective-prosecution standard, *O'Brien* would provide the correct test for any First Amendment analysis. And, as the foregoing discussion illustrates, the good-faith exercise of prosecutorial discretion would meet the other elements of *O'Brien*. Accordingly, we submit that claims of selective prosecution like that raised by petitioner do not call for a separate First Amendment inquiry and are properly analyzed under the traditional selective-prosecution standard. In fact, the courts of appeals have uniformly followed this course and have never suggested that an independent First Amendment appraisal is necessary or appropriate. Petitioner's contrary approach would be a radical and unwarranted departure from prevailing law and should be rejected.

ARGUMENT

I. THE SELECTION OF PETITIONER FOR PROSECUTION DID NOT IMPERMISSIBLY DISCRIMINATE AGAINST HIM

A. A Prosecutor Has Broad Discretion In Initiating A Criminal Case, And, Unless Deliberately Based On Improper Considerations, The Exercise Of That Discretion Is Not Subject To Judicial Review

The doctrine of prosecutorial discretion is a cardinal feature of our system of criminal justice. "[S]o long

as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see also *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979).

The "broad discretion" exercised by prosecutors (*Butz* v. *Economou*, 438 U.S. 478, 515 (1978)) derives from the basic structure and operation of the tripartite system of federal government. Pursuant to Article II of the Constitution, "[t]he executive Power * * * [is] vested in * * * [the] President of the United States" (§ 1, Cl. 1), who is charged to "take Care that the Laws be faithfully executed" (§ 3). One of the principal powers of the Executive is to bring criminal prosecutions "in the name of the United States as sovereign." *United States* v. *Nixon*, 418 U.S. 683, 694 (1974); see also *United States* v. *Russell*, 411 U.S. 423, 435 (1973). In the exercise of this power "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *Nixon*, 418 U.S. at 693; see also *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 456-459 (1869). And of course the Attorney General, acting either directly or through subordinate officials in the Department of Justice, "is the hand of the President in taking care that the laws of the United States * * * in the prosecution of offenses be faithfully executed." *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); see also *Nixon*, 418 U.S. at 694; *United States* v. *Johnson*, 323 U.S. 273, 279 (1944); 28 U.S.C. 509, 510, 515, 516, 532. The doctrine of prosecutorial discretion rests on this fundamental authority reserved to the Executive under the principle of separation of powers and serves to ensure that the judiciary does not impermissibly intrude upon functions entrusted to the co-equal branch of government responsible for law enforcement.

In addition, the practical implementation of this executive responsibility makes it largely inappropriate and unsuited to judicial oversight. Indeed, as Chief Justice (then Judge) Burger has observed, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings • • •." *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

First, "the manifold impondera[bles] which enter into the prosecutors' decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision." *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973). Because "[t]he determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions" (*United States* v. *Lovasco*, 431 U.S. 783, 793 (1977)), the prosecutor must exercise judgment in selecting cases to be brought. Moreover, "[t]he decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest" (*id.* at 794). Foremost among these are the defendant's "culpability, as distinguished from his legal guilt" (*ibid.*), the need to "promote • • • respect for the law" (*Poganó* v. *Klein*, 191 F. Supp. 630, 634 (S.D.N.Y. 1961)) and to establish a "deterrent effect on others • • • [in order to] promot[e] more general compliance with the • • • laws" (*United States* v. *Cuillet*, 564 F.2d 964, 969 (9th Cir. 1979)), and "the relative importance of the offense compared with the competing demands of other cases on the time and resources of investigation, prosecution and trial" (*Poganó* v. *Klein*, 191 F. Supp. at 635).[11] The assessment and weighing of these and other relevant factors are generally not sus-

[11] See also *Lovasco*, 431 U.S. at 794 n.15; *United States* v. *Berrigan*, 482 F.2d 171, 180-181 (3d Cir. 1973); *Poganó* v. *Klein*, 191 F. Supp. at 634-635.

ceptible to fixed legal standards but instead call for the application of informed judgment and discretion.

Furthermore, judicial review of the prosecutor's charging decisions would entail substantial systemic costs and pose serious problems of administration. Because examination of the basis for a prosecution diverts the proceeding from the central issue of the defendant's guilt, "'[u]nwarranted judicial inquiries would • • • undermine the strong public policy that resolution of criminal cases not be unduly delayed by litigation over collateral matters.'" *United States* v. *Ross*, 719 F.2d 615, 619 (2d Cir. 1983), quoting *United States* v. *Moon*, 718 F.2d 1210, 1230 (2d Cir. 1983), cert. denied, No. 83-1242 (May 14, 1984). Such examination also would probe the internal deliberative process by which prosecutorial decisions are made. See *United States* v. *Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973); *cf. Nixon*, 418 U.S. at 703-716. This would often require that the prosecutor himself testify to explain his decision, that he divulge the details of the defendant's case as well as of other cases (whether the subject of a prosecution, still under investigation, or closed) to show that no impermissible selection occurred, and that he reveal internal files, grand jury transcripts, and other confidential materials in order to demonstrate the basis for his actions.[12] In addition to the burdens and disruption that would result, such disclosures could impede effective law enforcement and undermine general deterrence by providing offenders with a "roadmap" of prosecutorial decisionmaking.

For these reasons, the prosecutor is vested with "broad discretion" (*United States* v. *Goodwin*, 457 U.S. 368, 380

[12] See *United States* v. *Anson*, 669 F.2d 1351, 1356-1357 & nn.7, 7a (10th Cir. 1981), cert. denied, 459 U.S. 825 (1982); *United States* v. *Johnson*, 577 F.2d 1304, 1309 (5th Cir. 1978); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *Berrigan*, 482 F.2d at 181; *United States* v. *Falk*, 479 F.2d 616, 620, 623 (7th Cir. 1973) (en banc); *id.* at 627 & n.5, 631-632 & n.8 (Cummings, J., dissenting); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d at 380; see also *United States* v. *Eklund*, 733 F.2d 1287, 1308 (8th Cir. 1984) (en banc) (Heaney, J., dissenting), petition for cert. pending, No. 83-1910.

n.11 (1982)) that is not generally subject to judicial review. And, because such discretion is an integral part of the criminal justice system, "'the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation.'" *Ibid.*, quoting *Bordenkircher* v. *Hayes*, 434 U.S. at 364, and *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). "[P]rosecutor[s are] duty bound to exercise [their] best judgment • • • in deciding which suits to bring" (*Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976)), and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926); see also *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943); *Gregg* v. *Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring in the judgment); *Cameron* v. *Johnson*, 390 U.S. 611, 623 (1968) (Fortas, J., dissenting).

To be sure, "[s]electivity in the enforcement of criminal laws is • • • subject to constitutional constraints." *Batchelder*, 442 U.S. at 125; see also *Two Guys* v. *McGinley*, 366 U.S. 582, 588 (1961). As the Court has held, "[t]he Equal Protection Clause prohibits selective enforcement" (*Batchelder*, 442 U.S. at 125 n.9) against a defendant whose selection from among others similarly situated "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles*, 368 U.S. at 456; see also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

The vice in such selective enforcement is the prosecutor's abuse of his public office by exercising his authority on the basis of improper and invidious considerations—a course that is incompatible with the very rule of law on which our legal system rests. "Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." *United States* v. *Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974). The rule against selective prosecution applies "in the rare situa-

tion in which the decision to prosecute is so abusive of [the prosecutor's] discretion as to encroach on constitutionally protected rights • • •." *United States* v. *Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978).

Accordingly, the Court has recognized that "[i]n appropriate circumstances • • • traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions • • • were motivated by improper factors • • •." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 249. This standard, by focusing on the motivation of the prosecutor, reflects the rationale that underlies the doctrine of selective prosecution: the prosecutor should not be allowed to abuse his otherwise broad and unreviewable discretion by making decisions on the basis of impermissible considerations. Thus, as the Court stated in *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944), "administration by • • • officers of a • • • statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." See also *Mackay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94, 100 (1919); *Yick Wo* v. *Hopkins*, 118 U.S. at 373-374.[18] And under this standard "a discriminatory purpose is not presumed; there must be a showing of 'clear and intentional discrimination.'" *Snowden* v. *Hughes*, 321 U.S. at 8 (citations omitted).

In line with the decisions of this Court, the lower federal courts have uniformly held that a defendant seeking to establish a claim of selective prosecution must show that he was chosen for prosecution although others similarly situated were not and that the prosecutor intentionally discriminated against him on the basis of im-

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[18] This standard is also consistent with the Court's analysis in other cases that equal protection is not violated in the absence of purposeful discrimination. See *Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976).

permissible considerations.[14] Moreover, although this Court has not directly addressed the question, the courts of appeals are in agreement that it is impermissible for a prosecutor intentionally to bring criminal charges for the purpose of penalizing or deterring the exercise of a First Amendment or other constitutional right.[15] This test for selective prosecution is a "rigorous" one (*United States* v. *Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982)). "The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in a nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice" (*United States* v. *Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc)), and "defendants bear a very heavy burden" to demonstrate that they were singled out for prosecution on an impermissible basis. *United States* v. *Greene*, 697 F.2d 1229, 1235 (5th Cir. 1983), cert. denied, No. 82-1941 (June 27, 1983). "[T]he judiciary performs the very limited role of secondarily measuring the primary decision of the prosecutor against constitutional standards." *Johnson*, 577 F.2d at 1307-1308.

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[14] See, *e.g.*, *United States* v. *Sands*, 632 F.2d 1126, 1135-1136 (6th Cir. 1981); *United States* v. *Rose*, 719 F.2d 615, 619-620 (2d Cir. 1983); *United States* v. *Torquato*, 602 F.2d 564, 568-570 (3d Cir. 1979); *United States* v. *Barber*, 668 F.2d 778, 782-783 (4th Cir.), cert. denied, 459 U.S. 829 (1982); *United States* v. *Jennings*, 724 F.2d 436, 445 (5th Cir. 1984); *United States* v. *Hazel*, 696 F.2d 473, 474-475 (6th Cir. 1983); *United States* v. *Peskin*, 527 F.2d 71, 86 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *United States* v. *Wyman*, 724 F.2d 684, 687 (8th Cir. 1984); *United States* v. *Ness*, 652 F.2d 890, 892 (9th Cir.), cert. denied, 454 U.S. 1126 (1981); *United States* v. *Salazar*, 720 F.2d 1482, 1487 (10th Cir. 1983); *United States* v. *Mangieri*, 694 F.2d 1270, 1273, 1275 (D.C. Cir. 1982).

[15] See, *e.g.*, *United States* v. *Greene*, 697 F.2d 1229, 1236 (5th Cir. 1983), cert. denied, No. 82-1941 (June 27, 1983); *Hazel*, 696 F.2d at 474-475; *Mangieri*, 694 F.2d at 1273; *Amos*, 669 F.2d at 1356-1357; *Sands*, 632 F.2d at 1135; *United States* v. *Wilson*, 639 F.2d 500, 503-504 (9th Cir. 1981); *Torquato*, 602 F.2d at 569 n.9; *Catlett*, 584 F.2d at 866-867; *Berrios*, 501 F.2d at 1209-1212; *Falk*, 479 F.2d at 618-624; *United States* v. *Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972); *United States* v. *Crowthers*, 456 F.2d 1074, 1078-1081 (4th Cir. 1972).

Applying this two-part standard, we submit that petitioner has failed to satisfy either prong.

B. Petitioner Was Not Impermissibly Selected For Prosecution On The Basis Of His Exercise Of First Amendment Rights

1. *Petitioner Was Not Singled Out For Prosecution From Among Others Similarly Situated*

It is undisputed that, when this prosecution was commenced, there were approximately 500,000-700,000 men who had failed to register with the Selective Service System as required by law.[16] Petitioner contends that he and the other 12 people indicted for nonregistration at the time of this prosecution[17] were "[v]ocal [n]onregistrants" (Br. 5) and "outspoken dissenter[s] against the draft and the draft registration program" (*id.* at 7), and that they were improperly chosen for prosecution on this account. Even accepting petitioner's characterization of the defendants as "vocal nonregistrants,"[18] these facts do not

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[16] See Pet. Br. 5; Pet. App. A9; *Oversight Hearing* 1, 5, 8, 10, 20; see also *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984), slip op. 12 & n.11.

[17] Since registration began in 1980, a total of 16 people have been prosecuted for failure to register. See Semiannual Report of the Director of Selective Service for the Period Oct. 1, 1983-Mar. 31, 1984, at 10-11.

[18] The term "vocal" is misleading insofar as it suggests that all of those indicted had made public statements of opposition to draft registration. In some cases the only statement made by the defendant prior to indictment was a letter to the government declaring his refusal to register, which petitioner elsewhere recognizes (Br. 19 n.22) to be a private communication. In *United States* v. *Schmucker*, petition for cert. pending, No. 83-2055, the district court explained (83-2055 Pet. App. 21a):

> [N]either [Schmucker], nor previously convicted Eston Eller, publicly called attention to their non-registration prior to their indictments. Rather, the notoriety surrounding their cases appears to have come only as a result of the government's prosecution. A thorough examination of [Schmucker's] briefs and exhibits suggests nothing else. The only clue regarding [Schmucker's] pre-indictment public posture has come to this Court's attention through the extrajudicial source of a local newspaper article published on or about the date of his indict-

demonstrate that they were singled out for prosecution from among others similarly situated under the first part of the selective-prosecution standard.

In analyzing this issue, the purpose of the first element of the selective-prosecution test must be properly understood. To establish his claim, a defendant must initially show that there has been some discrimination that calls for judicial examination of the reasons for the prosecution. The first prong screens out those cases in which such inquiry is not warranted and hence serves to ensure that the costs associated with litigating the selective-prosecution defense are not unnecessarily imposed on the criminal justice system (see pages 20-21, *supra*). Accordingly, the relevant question is whether the defendant has sufficiently shown discrimination to justify an inquiry into the process of prosecutorial decisionmaking.

Initially, petitioner's position that the Court should consider the group selected for prosecution as being the 13 individuals actually indicted totally misconceives the relevant universe for evaluating the selectivity of the "passive enforcement" program. In fact, more than 1,000 names were reported or self-reported to Selective Service (see *Oversight Hearing* 8, 10); and of those in this group who were required to register, the overwhelming majority, unlike the 13 nonregistration defendants, availed themselves of one of the several opportunities offered them to avoid prosecution by late registration. Petitioner has not established that the relevant group of prospective targets identified under the "passive" system (a majority of whom were reported by third parties, see page 3, *supra*) was comprised, like the small group of defendants on which he focuses, largely or entirely of "vocal" nonregistrants so as to support a prima facie showing of discrimination.

In any event, even looking to the 13 nonregistration defendants, the first prong of the selective-prosecution test is not satisfied by petitioner's showing that nonregistrants prosecuted under the start-up "passive enforcement" program differ from a randomly selected group of nonregistrants in terms of the probability that they have expressed politically or religiously based opposition to draft registration. Those prosecuted all share a salient characteristic that is an entirely legitimate basis for distinguishing between them and other potential violators—their violator status was known to the government. Accordingly, because he has not established that the government failed to proceed against other known nonregistrants, there has been no showing that he was prosecuted while other people similarly situated were not. As the Court explained in *Oyler* v. *Boles*, 368 U.S. at 456, equal protection is not violated where "the failure to proceed against other * * * offenders was due to lack of knowledge * * * on the part of the prosecutors * * *. [It is not sufficient to allege nothing] more than a failure to prosecute others because of a lack of knowledge of their * * * offenses."[18] Under this standard, in order to "prove[] that others similarly situated generally had not been prosecuted * * * [the defendant must show that] the government knew of a number of violations of the statutes involved and chose to prosecute only those who spoke out against the laws. * * * [The defendant has to] prove that the Government failed to prosecute persons it knew had violated the * * * laws." *United States* v. *Kohl*, 535 F.2d 1351, 1353 (5th Cir. 1976). See *United States* v. *Martin*, 537 F. Supp. 681, 687 (S.D. Iowa 1982), rev'd on other grounds, 733 F.2d 1309 (8th Cir. 1984) (en banc), petition for cert. pending, No. 83-1933.[19]

Moreover, this facet should not be viewed in isolation, and other aspects of petitioner's claim of discrimination

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ment, in which Schmucker was described as "soft spoken" and "uneasy at the center of attention." He was quoted as indicating that he is unaccustomed to publicity.

[18] See also Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 Colum. L. Rev. 144, 148 & n.23 (1984) (under *Oyler*, selective-prosecution defense requires proof that other individual violators were known to the government but not prosecuted).

[19] In *Ellicott*, Judge Heaney's dissenting opinion stated (733 F.2d at 1307-1308) that the government failed to pursue non-

indicate as well that it fails to provide a basis for probing into the decision to prosecute him. Indeed, the case is devoid of the kinds of factors that would be expected if, as petitioner argues, nonregistration prosecutions discriminated on First Amendment grounds. First, petitioner does not deny that the government investigated "non-vocal" as well as "vocal" nonregistrants who were reported to it as possible violators and would have prosecuted those who continued to refuse to register. In addition, there is no allegation that the government brought charges against nonregistrants who—like petitioner—exercised their First Amendment rights to protest draft registration but who—unlike petitioner—were not reported to the government as possible violators.[27] Nor is it asserted that the government focused on the leaders or others in prominence among nonregistrants. Likewise, the small number of prosecutions that were initiated, when compared to the apparently large number of young men who spoke out in opposition to draft registration, undercuts the idea that the government was seeking to

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registrants who did not respond to letters from Selective Service requesting that they register and advising them of the possible consequences of refusing to do so. This is incorrect; indeed, petitioner himself did not respond to the Service's letter (see page 6, *supra*). The names of such individuals were referred, along with the names of those who did respond and declined to register, to the FBI and the appropriate United States Attorney for further investigation and possible prosecution. See J.A. 0280-0288, 784. We are advised that, of the group discussed by Judge Mansfield, nine people were indicted, 108 cases were eventually closed, and 17 are still pending; of the 108 closed cases, 55 were terminated because the person registered, 14 because the person was too old and not required to register, 1 because the person was female and not required to register, 3 because the person was in the active military, 11 because the person could not be located or the case was determined to involve a fictitious name, and 24 because the person was an alien who apparently had left the country or had an unknown address.

[27] To the contrary, the record indicates that people who wrote to the government to protest registration but did not state that they had refused to comply with the law were not subject to investigation and potential prosecution (see page 15, *supra*).

silence those who criticized the Selective Service laws. Finally, "vocal" opponents of the registration law who were reported to the government, like other reported violators, were given the opportunity to avoid prosecution by registering under the "beg" policy. See generally *Eklund*, 733 F.2d at 1293. Taken together, these considerations belie the contention that the government discriminated among nonregistrants in retaliation for or in an attempt to discourage the exercise of First Amendment rights.

In the end, petitioner's claim of discrimination must fail because it misconceives the nature of the nonregistration prosecutions. Much like a civil contemnor, these defendants "carr[ied] 'the keys of their prison in their own pockets'" (*Shillitani* v. *United States*, 384 U.S. 364, 368 (1966) (citation omitted)) and had the ability to prevent prosecution altogether by registering pursuant to the "beg" policy. In this sense the nonregistrants rather than the government controlled the decision to prosecute; it was self-selection by the defendants through their persistent refusal to register, not conscious selectivity by the government, that led to the charges against them. In these circumstances, a claim of selective prosecution must be rejected for failure to establish that the government discriminated against the defendants in relation to others similarly situated.

2. *The "Passive Enforcement" System Served Legitimate Governmental Purposes And Did Not Base Prosecutions On the Exercise Of First Amendment Rights*

In addition to failing to show the requisite discrimination, petitioner's contentions also do not establish the second prong of the selective-prosecution test: that the decision to prosecute was "'deliberately based upon an unjustifiable standard'" (*Bordenkircher* v. *Hayes*, 434 U.S. at 364, quoting *Oyler* v. *Boles*, 368 U.S. at 456) or "motivated by improper factors" (*Marshall* v. *Jerrico, Inc.*, 446 U.S. at 249).

Petitioner does not assert that he was individually selected for prosecution on the basis of his exercise of First Amendment rights. Indeed, the record shows that petitioner was treated no differently from any other nonregistrant and that, apart from the letters he wrote to government officials, neither the Justice Department nor Selective Service had any knowledge of petitioner's anti-registration activities. Petitioner was prosecuted because he admitted to the government his violation of the law and declined several requests to register. See pages 2-3, 4, 7, 12, *supra*.

Petitioner does contend that the "passive enforcement" system, by "design and necessity" (Br. 22), selected for prosecution only those nonregistrants who had exercised their First Amendment rights. This contention does not meet the second part of the selective-prosecution standard.

a. Initially, we submit that the First Amendment is simply not involved in this case. See *Eklund*, 733 F.2d at 1295. The "passive enforcement" system did not turn on the nonregistrant's First Amendment activities or employ "a First Amendment trip-wire" (Pet. Br. 26).

The critical consideration in pursuing an investigation and possible prosecution was the fact that a person was reported, by either his own submission or that of a third party, to be a nonregistrant. It was that indication of violation, not the contents of any criticisms or protests of government policy that might have accompanied it, that engaged the process. See *Eklund*, 733 F.2d at 1292. A person who admitted his nonregistration but did not oppose the registration system—whether as, *e.g.*, an act of defiance or rebellion (see J.A. 285), a matter of conviction, or a statement of religious scruple—was subject to investigation and prosecution; conversely, a person who wrote to the government to oppose the registration requirement, even in the most vehement terms, but did not admit a violation of the law, was not considered for further investigation (see page 13, *supra*). Under the "passive enforcement" policy, both the existence and the substance of any protest against government policy—

whatever its nature and location on the political spectrum—were immaterial.

In addition, while a nonregistrant's expression of protest to the government is protected by the First Amendment, his confession of a violation, as such, is not. There is nothing in the Constitution that precludes the government from considering a volunteered admission of guilt in determining whether to bring a prosecution, and it does not matter whether that admission is conjoined with other statements that come within the First Amendment.[29] See *Eklund*, 733 F.2d at 1291.[30] Indeed, it cannot be doubted, as petitioner concedes (Br. 21, 22, 26 n.35), that his letters could be used by the government as evidence of the willfulness of his failure to register. Thus, although petitioner could not be selected for prosecution in retaliation for his expression of opposition to government policy, it was entirely proper for Selective Service and the Department of Justice to act on the basis of his self-reported confession of nonregistration.[31]

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[29] Contrary to petitioner's characterization (Br. 21), the issue is not whether his confession "strip[s] his * * * protest [in letters to the government] of its fundamental character as constitutionally protected speech." Rather, the question is whether the confession itself, which was not otherwise safeguarded by the First Amendment, took on constitutional protection simply because it was offered in letters that criticized government policy.

[30] Cf. cases cited in note 33, *infra*. For example, as the court stated in *United States* v. *Street*, 601 F.2d 935, 938 (7th Cir.), cert. denied, 444 U.S. 979 (1979) (footnote omitted), "[a]ggressively displaying one's antipathy to * * * [a law] or during the government to enforce it does not create immunity from, or a defense to, prosecution."

[31] It is especially ironic for petitioner to seek to avoid prosecution on the ground that his confession was constitutionally protected. As petitioner recognizes (Br. 21), the only possible expressive significance of that admission derives from the fact that it served to subject him to a greater chance of prosecution and thereby demonstrated his "firm opposition to the draft." To the extent that the First Amendment prohibits the government from considering that statement for purposes of prosecution, it would be inconsistent with the very basis for petitioner's invocation of the

Moreover, because of the "bag" policy, prosecution under the "passive enforcement" system did not and could not interfere with a "vocal" nonregistrant's First Amendment rights. A "vocal" nonregistrant was completely free to engage in constitutionally protected activity to protest draft registration; at the same time, even the most adamant and outspoken critic could have avoided prosecution for his Selective Service violation by registering under the "bag" policy, thus remaining able without fear of prosecution to continue public opposition to draft registration in the fullest exercise of his rights of free speech and petition. And, as petitioner admits (Br. 14, 22), there is no First Amendment privilege to refuse to register.[*] Hence, the possibility of prosecution could not burden a nonregistrant's exercise of constitutional rights, since he need only have fulfilled his legal duty to register in order to prevent prosecution. In essence, the enforcement scheme abridged no First Amendment rights but only the "right" to persist in a refusal to comply with the concededly valid registration requirement. Cf. *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984), slip op. 5-9.

That the "passive enforcement" system did not depend on the nonregistrant's exercise of First Amendment rights is also made clear by the provision for third-

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First Amendment in the first place. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1489 & n.33 (1975).

[*] This Court has stated that the First Amendment affords no right to refuse to comply with the Selective Service laws. See Welsh v. *United States*, 398 U.S. 333, 336 (1970) (Harlan, *J.*, concurring in the result); *Hamilton* v. *Regents*, 293 U.S. 245, 262-263 (1934); *id.* at 265-268 (Cardozo, *J.*, concurring); *United States* v. *Macintosh*, 283 U.S. 605, 623-624 (1931), overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61 (1946); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29 (1905). Indeed, in the debates on the Bill of Rights, the First Congress rejected a proposal to exempt people from military service on the ground of religious scruples. See 1 Annals of Cong. 434, 750 (J. Gales ed. 1789); Russell, *Development of Conscientious Objector Recognition in the United States*, 39 Geo. Wash. L. Rev. 409, 414-417, 426-429 (1962).

party reporting, which in fact accounted for somewhat more than one-half of the reports of violations received by the government (see page 3, *supra*). In these instances "[f]riends, neighbors or concerned citizens contact Selective Service and report alleged non-compliance with the registration requirement" (J.A. 554). Such third-party reports plainly do not involve or interfere with the right of the nonregistrant to petition the government for redress of grievances. Nor, contrary to petitioner's assertion (Br. 26 n.20), are third-party reports necessarily based on the nonregistrant's protected speech publicly protesting government policy. A third party can learn of another person's failure to register in numerous ways that have nothing to do with the nonregistrant's exercise of First Amendment rights. For example, parents or friends could become aware of the violation in a private and casual conversation with the nonregistrant; or they could know of objective circumstances concerning the nonregistrant's whereabouts or activities that make it extremely improbable that he complied with the law; or they may believe from their general knowledge of him that he was unlikely to have registered for the draft.

b. It is only by ignoring these features of the "passive enforcement" system that First Amendment concerns are brought into play at all in this case. Thus, in our view, the above discussion is sufficient to end the matter. But even accepting, as petitioner contends, that the impact of the system on "vocal" nonregistrants calls for further inquiry, the record refutes the claim of impermissible selective prosecution. In the ensuing discussion, therefore, we shall assume, as petitioner would have it, that the "passive" system focused on "vocal" nonregistrants who wrote to the government to protest the registration law and in so doing confessed their violation.

Even under that assumption, however, the "passive enforcement" system served a number of legitimate governmental purposes and did not rest on the impermissible basis of penalizing or discouraging the exercise of First Amendment rights. See Note, *supra*, 84 Colum. L. Rev. at

144, 148. First, by relying on reports of nonregistration, the system allowed the government to identify violators and bring enforcement proceedings with a minimal expenditure of its limited investigatory and prosecutorial resources.[30] Second, 50 U.S.C. App. 462(a) requires the government to prove that the defendant, with knowledge of his obligation and the intent not to comply, "knowingly" did not register as required by law;[31] because failure to register "is by itself an equivocal act" that could easily be asserted to be due to such things as ignorance, mistake, or inadvertence, the defendant's confession would be "most useful in showing" his knowledge of the obligation to register and his deliberate refusal to do so. *United States* v. *Traylor*, 656 F.2d 1311, 1323 n.5 (9th Cir. 1981), petition for cert. pending, No. 81-6202.[32] Third, prosecution of "vocal" defendants would be especially effective to promote general deterrence and prevent the possibility that the failure to proceed against a publicly known offender would encourage others to violate the law.[33] Finally, it is not inappropriate for the

[30] *See* *United States* v. *Hoover*, 727 F.2d 987, 990 (10th Cir. 1984); *United States* v. *Rice*, 659 F.2d 924, 927 (9th Cir. 1981); *Smith*, 652 F.2d at 1139; *United States* v. *Pabellon*, 648 F.2d 595, 599-600 (9th Cir. 1981); *Wilson*, 629 F.2d at 599; *Johnson*, 577 F.2d at 1309; *United States* v. *Ojala*, 544 F.2d 949, 949 (8th Cir. 1976); *Detention of Aliens Convicted Felony* v. *Rockefeller*, 477 F.2d at 980; *see also* *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).

[31] *See, e.g.*, *United States* v. *Strachan*, 599 F.2d 993, 995 (9th Cir. 1979); *United States* v. *Klein*, 560 F.2d 980, 980-982 (9th Cir. 1977); *Rockefeller* v. *United States*, 380 F.2d 488 (9th Cir. 1968).

[32] *See also* *Wilson*, 629 F.2d at 599. For example, petitioner's initial letters to the government stated that he had "not registered for the draft * * * [and] plan[ned] never to register" (J.A. 716) and that he had "deci[ded] to consciously and willfully break a law of my country. * * * * * I decided to obey my conscience rather than man-law" (J.A. 715-717). *See also* J.A. 719.

[33] *See* *Hoover*, 727 F.2d at 989-990; *Greene*, 697 F.2d at 1234; *Rice*, 659 F.2d at 927; *Traylor*, 656 F.2d at 1321; *Amen*, 649 F.2d at 1356; *Smith*, 652 F.2d at 1138; *Hsu*, 662 F.2d at 902; *Catlett*,

government to consider the flagrancy of the violation[34] by those who announced their nonregistration to the government, declined repeated opportunities to register under the "beg" policy, and invited the government to prosecute them.[35]

Petitioner undertakes to challenge these evident justifications for the enforcement policy. Although he agrees (Br. 33, 34) that these objectives represent legitimate and substantial governmental interests in general, he argues that they are inapplicable or insufficient to sustain the prosecution here. As we now discuss, petitioner's arguments are nothing more than an attack on the wisdom of the prosecutorial approach in nonregistration cases. His contentions are misdirected, for the role of the selec-

584 F.2d at 868; *Johnson*, 577 F.2d at 1309; *Ojala*, 544 F.2d at 944-945.

[34] *See* *Hoover*, 727 F.2d at 990; *Rice*, 659 F.2d at 927; *United States* v. *Rivinson*, 658 F.2d 182, 188 (10th Cir. 1980); *United States* v. *Hollman*, 611 F.2d 1133, 1139 (7th Cir.), cert. denied, 447 U.S. 922 (1980); *Stout*, 601 F.2d at 328; *Johnson*, 577 F.2d at 1309; *Ojala*, 544 F.2d at 944.

Indeed, even with respect to offenses for which criminal prosecutions are not generally brought, like simple possession of marijuana in some jurisdictions, authorities would surely be entitled to prosecute someone who came into a police station and lit a marijuana cigarette to protest the inequity of the law banning such action.

[35] Petitioner informed the government in his letters that he "realized the possible consequences of [his] action, and [he] accept[ed] them" (J.A. 716). In addition, as explained in our brief (at 2) in response to the petition in *Eklund* v. *United States*, No. 83-1939 (a copy of which is being provided to counsel for petitioner), the defendant in that case sent a letter to Selective Service informing it that he had failed to register "as the law require[s]" and that he did not intend to register in the future because of his belief that the government lacked "the right to force unwilling individuals to participate in the military." Observing that no one had yet been prosecuted for noncompliance with the registration law, he volunteered to be the first and requested that the government within the next few months "either begin prosecution or send me a letter apologizing for the disruption in my life * * *."

tive-prosecution *defense* is not to second-guess the prosecutor's strategy.[26]

Petitioner contends (Br. 35) that it was "unnecessary" for the government to rely on his self-confession to prove willfulness because that element was "sufficiently" shown by his later failure to register after he was personally notified, pursuant to the "beg" policy, of his obligation to do so. For this reason, he asserts that his initial admissions were not "'necessary or even useful to establish willfulness'" (*ibid.*; citation omitted). We submit, however, that it is for the prosecutorial agencies of government, not defendants, to determine what proof is "necessary," "sufficient," or "useful." *See Lovasco*, 431 U.S. at 793, 794-795; *cf. Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). Furthermore, the government is entitled to prosecute and present to the jury its strongest cases by showing that the defendant's failure to register persisted over a considerable period of time and was deliberate from the start. Finally, the evidence developed as a result of the "beg" policy may be more ambiguous or problematic than petitioner acknowledges. For example, where the certified "beg" letter from the government was accepted by a member of the defendant's family rather

[26] Amici Central Committee for Conscientious Objectors, et al., acknowledge (CCCO Br. 14-16, 20-21, 24, 25, 29) that the established standard for selective prosecution requires the defendant to show an impermissible motive or intent on the part of the government. They then propose a complex method, based on inferences from statistical data, to demonstrate such an intent in this case. Of course, even where, as here, the ultimate test is one of discriminatory intent rather than simply disparate impact, proof of the effects of an action may, in appropriate circumstances, shed light on the actor's motivation. But even assuming that the small sample in this case (13 prosecutions out of a universe of more than 500,000 nonregistrants) is an adequate basis for amici's approach, it is unnecessary here to undertake an inferential analysis of the government's purpose because of the extensive direct evidence that was introduced on that issue and that plainly refutes any inference of actual invidious motivation.

than by the defendant himself,[27] he could seek to argue that he never in fact received it. Alternatively, he could assert that, despite the letter, he misunderstood or was confused about his obligation.[28] The Constitution does not require the prosecutor to run the risk of an acquittal by forgoing highly probative and reliable evidence of the defendant's guilt.

Petitioner also asserts that the prosecution policy "simply [did] not foster deterrence" (Br. 33) because an unreported nonregistrant "knows that as long as Selective Service relies exclusively upon passive identification, he is totally immune from prosecution" (*id.* at 34). This argument overlooks that, prior to judicial hearings on the issue of selective prosecution, nonregistrants did not know the government's prosecution policy. Rather, the government made every effort to maintain the secrecy of its policy.[29] Thus, nonregistrants could not formulate a plan to avoid prosecution. Beyond that, petitioner's argument reflects a misunderstanding of the deterrent effect of nonregistration prosecutions. Government officials consistently recognized the importance of criminal prosecutions in promoting general compliance with the registration law. Such prosecutions emphasized the seriousness of the duty to register, indicated the government's intention to en-

[27] In this case, the original certified letter from Selective Service was signed for by a Marcia Wayte and not by petitioner (J.A. 643, 734).

[28] For instance, petitioner declined to tell an FBI agent whether he understood the letters he received from Selective Service and the United States Attorney concerning his duty to register (J.A. 729-730). Analogously, as we explain in our brief (at 8) in response to the petition in *Eklund* v. *United States*, *supra*, the defendant there acknowledged that during the six-day period prescribed for registration he was aware of the Selective Service law but believed that he did not have to register because a court had invalidated the statute on grounds of gender discrimination; this illustrates that even a defendant who is informed of the registration requirement may contend that the failure to register was not knowing.

[29] *See* J.A. 256, 258, 535-536 & n.3, 561, 684; *see also Oversight Hearing* 23.

force the statute, and publicized the registration requirement. And in fact, contrary to petitioner's assumption, experience has shown that criminal prosecutions lead to increased registration.[96] Thus, the government's enforcement policy was a reasonable and permissible means of furthering the goal of deterrence.

Petitioner further contends (Br. 36-37) that considerations of limited government resources do not serve to support the "passive enforcement" system. We do not think it can be doubted, however, that this system required only a modest expenditure of investigatory and prosecutorial resources and made effective use of the level of funds devoted to criminal enforcement of the registration law. Whether other approaches were subsequently developed and implemented at an acceptable cost is simply irrelevant to the validity of the "passive enforcement" system in the circumstances under which it was employed.[97]

More importantly, the "passive enforcement" system was intended to be merely the initial step in devising a prosecution policy. As discussed above (see pages 7-10, *supra*), the development of an "active" system proved to be a difficult and lengthy task. As a result, by March 1982 an "active" system was not yet in place. Because further delays in initiating prosecutions would have impaired compliance with the registration law and caused "the registration scheme [to] suffer greatly" (J.A. 663), the Department of Justice "reluctantly conclude[d]" (*ibid.*) that it should proceed with cases under the "passive enforcement" system.

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[96] See J.A. 271, 277, 390-393, 397-398, 481-482, 848; see also *Eklund*, 733 F.2d at 1294.

[97] It should also be noted that the enforcement system petitioner prefers, based on access to computer data banks, has been subject to criticisms. For example, some have objected that such a system entails invasions of privacy and could interfere with the purposes for which the records were originally developed. See *Oversight Hearing* 42 (statement of Draft Action). In addition, where the data are not complete and available nationwide, the enforcement system may be uneven and unfair and fail to achieve a uniform level of compliance. See page 9, *supra*.

The circumstances surrounding the initiation of the "passive enforcement" system and the efforts to create a more "active" system clearly refute the notion that the initial "passive" system was motivated by an intent to single out for prosecution those nonregistrants who had exercised their First Amendment rights. Moreover, against this background, the fact that the currently operational "active enforcement" system might have been adopted earlier does not, as petitioner suggests (Br. 10 & n.15, 36-37), discredit the "passive" system. The government initially sought to develop a uniform and comprehensive "active" system based on Social Security data, and therefore it decided not to use state driver's license lists because they were not available from all states and did not include all those required to register. That an "active" system using driver's license records was later implemented, after attempts to develop a more desirable system relying on Social Security data had proven unworkable, surely does not impugn the government's use of the "passive" system in the meantime.[98]

Finally, petitioner cites (Br. 3-6, 9, 30 n.30) to internal government documents as showing impermissible prosecutorial motivation. To be sure, in deciding that criminal prosecutions should proceed in order to further compliance with the registration law, the government was aware that under the "passive" system "the first prosecutions [were] liable to consist of a large sample of (1) persons who object [to registration] on religious and moral grounds and (2) persons who publicly refuse to register" (J.A. 326). This reflected that such people were the most likely to subject themselves to prosecution by informing the government of their violation and re-

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[98] Petitioner also suggests (Br. 36-37) that FBI agents could have been sent out as an "active" means to find nonregistrants. Again, however, this overlooks that the government was trying to develop a comprehensive and efficient system for dealing with nonregistrants. The government was not required to divert the FBI from its other law enforcement responsibilities and devote its limited investigatory resources in an essentially ad hoc search for possible Selective Service violators. See J.A. 911.

fusing to register under the liberal "bag" policy. Since the enforcement system—including the "bag" policy—was "designed to ensure that * * * [a defendant's] refusal to register is willful" so that "only persons who are most adamant in their refusal to register will be prosecuted" (J.A. 289-290), it could be anticipated that these nonregistrants would self-select themselves for prosecution. The government also recognized—as subsequent events have confirmed—that prosecutions of nonregistrants were "liable to raise thorny selective prosecution claims" (J.A. 286) and were "liable to result in adverse judicial decisions based on defendant claims of selective prosecution" (J.A. 290). However, these statements do not indicate any intention to single out "vocal" nonregistrants. Rather, the record makes clear that government officials were seeking to be "alert * * * to possible problems. The idea was to avoid the problems, not to engage in any kind of selective prosecution" (J.A. 718). See *Eklund*, 733 F.2d at 1294. The government's actions surely are not to be condemned because of the professionalism of its lawyers in recognizing possible constitutional issues and exercising judgment and foresight in formulating litigation policy.

Moreover, the government's awareness of potential legal problems does not establish a purpose or motivation to discriminate against "vocal" nonregistrants. See *Eklund*, 733 F.2d at 1293, 1295. Here, petitioner has not shown that prosecutions were brought "'because of' and not merely 'in spite of'" the impact on "vocal" nonregistrants. *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979) (citations and footnote omitted); see also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240-242 (1976); *Snowden* v. *Hughes*, 321 U.S. at 8. On the contrary, the nonregistration prosecutions were justified by legitimate and important law enforcement considerations entirely unrelated to the suppression

of dissent. Accordingly, the record does not support an inference of impermissible motivation.[20]

II. THE SELECTION OF PETITIONER FOR PROSECUTION DID NOT VIOLATE THE FIRST AMENDMENT

In this Court petitioner has not renewed the argument, made in the courts below, that he was singled out for prosecution based on an impermissible motive under the traditional equal-protection standard governing the defense of selective prosecution. Instead, he now argues that his prosecution violated the First Amendment. Because petitioner has framed the issue in First Amendment terms, and because this case is the Court's first occasion to address a claim of selective prosecution based on the exercise of First Amendment rights, we shall discuss below the proper First Amendment analysis of petitioner's position.

In our view, however, claims like petitioner's do not present an issue under the First Amendment that is analytically distinct from the question of selective prosecution that has been considered above. Rather, the proper standard under the First Amendment essentially overlaps

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[20] Petitioner also contends (Br. 30 n.20) that the involvement of high-level officials outside the Department of Justice and the role of main Justice rather than the local United States Attorneys in setting prosecution policy raise questions about the government's good faith. But as the Eighth Circuit explained in *Eklund*, 733 F.2d at 1294:

> Surely it is not remarkable that high-ranking executive officials participated in formulating a policy for enforcement of laws pertaining to national security interests and involving hundreds of thousands of offenders, especially since it was contemplated that other executive agencies, specifically the IRS and the Social Security Administration, would become involved in the enforcement process.

See also 50 U.S.C. App. (Supp. V) 462(c) (presidential authority to require Social Security information to be provided to Selective Service); 28 C.F.R. 0.61(i) (1982) (Criminal Division responsible for enforcement of Military Selective Service Act); 1 ABA, *Standards for Criminal Justice* § 3-2.3 (2d ed. 1980) (desirability of establishing general prosecutorial guidelines).

the selective-prosecution test. Accordingly, the Court should reject petitioner's First Amendment argument and make clear that the appropriate analysis is the traditional selective-prosecution approach.

A. Petitioner's Prosecution Was Not Unconstitutional Under The First Amendment

At the outset, we reiterate our contention (see pages 30-33, *supra*) that the selection of petitioner for prosecution did not implicate his First Amendment rights at all.[40] First, it was irrelevant under the enforcement policy whether or how petitioner had exercised his First Amendment rights. Rather, he was prosecuted because he brought himself to the government's attention and confessed his violation of the registration law—a confession that was not itself protected by the First Amendment. In these circumstances, petitioner has no First Amendment claim to raise.

Second, petitioner could have avoided prosecution altogether by registering, as he was repeatedly requested to do, under the "beg" policy. Since, as he concedes, his refusal to do so was not within the First Amendment, petitioner's prosecution for nonregistration could hardly be said to chill his or others' constitutionally-protected activities. Petitioner was free at all times to exercise his First Amendment rights and would not have been subject to criminal prosecution if he had complied with his legal —and unchallenged—duty to register; the only freedom denied petitioner was that of continuing to violate the law.

In any event, assuming that the First Amendment is brought into play here, it was not violated. Any incidental effect of the "passive enforcement" system on First Amendment rights would be "sufficiently justified • • • if [the enforcement system] furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expres-

[40] It is, of course, petitioner's burden "to demonstrate that the First Amendment even applies." *Clark* v. *CCNV*, No. 82-1998 (June 29, 1984), slip op. 5 n.5.

sion; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. See also, *e.g.*, *Roberts* v. *United States Jaycees*, No. 83-724 (July 3, 1984), slip op. 12-13, 17-18; *Clark* v. *CCNV*, No. 82-1998 (June 29, 1984), slip op. 6, 10-11; *City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 14, 17-20, 25-27; *Younger* v. *Harris*, 401 U.S. 37, 51 (1971); *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 79-82 (1976) (Powell, J., concurring).[41]

The *O'Brien* test is satisfied in this case. To begin with, we submit that the exercise of prosecutorial discretion, such as the "passive enforcement" policy contested by petitioner, involves an important governmental interest. In general, the doctrine of prosecutorial discretion rests on fundamental constitutional principles of separation of powers, allowing the Executive Branch the independence and autonomy necessary to discharge its responsibilities. Prosecutorial discretion is also essential to the sound and efficient operation of the criminal justice system. And, in any particular case, the exercise of discretion both serves significant law enforcement purposes —such as establishing general deterrence or selecting the cases in which charges are most warranted because of the strength of the evidence or the culpability of the defendant—and furthers the policies of the statute that is being enforced.

Indeed, this last consideration is especially substantial in the present case. The "passive enforcement" system was designed to promote compliance with the draft registration requirement that President Carter reinstated in 1980; it cannot be doubted, as both the Executive and the Congress have recognized, that the governmental in-

[41] As these later decisions demonstrate, the *O'Brien* test is not limited to cases involving so-called "symbolic speech." See also Ely, *supra*, 88 Harv. L. Rev. at 1484.

terest in the registration system is of the highest order."[42] The government also recognized that the failure to initiate criminal prosecutions would impair the efficacy of the registration system; as the Assistant Attorney General for the Criminal Division stated, "[p]rosecution of non-registrants [was] necessary to deter people from refusing to register. Consequently, prosecutions [were] essential to the success of the registration system" (J.A. 387). To achieve that deterrence objective, the "passive enforcement" system was employed as an initial measure while efforts were made to develop a more "active" enforcement method. Particularly in these circumstances, the exercise of prosecutorial discretion that is challenged here furthered an important governmental interest.

In addition, the governmental interest in the "passive enforcement" system was unrelated to the suppression of First Amendment rights. As previously discussed (see pages 33-35, *supra*), this prosecutorial policy was justified by a number of considerations: the efficient use of the government's limited investigatory and prosecutorial resources; the desirability of pursuing strong cases where a "knowing" violation was clear and longstanding; the need to establish a general deterrent and proceed against visible offenders; and the appropriateness of prosecuting flagrant nonregistrants who flaunted their violation by calling it to the government's attention and persisting in their refusal to register despite numerous opportunities to comply. Moreover, these considerations are strongly reinforced here by the fact that the "passive" system was an initial enforcement measure that was necessary to promote compliance with the registration law until a

[42] See 16 Weekly Comp. Pres. Doc. 1274, 1274-1275 (July 2, 1980); S. Rep. 96-826, 96th Cong., 2d Sess. 160 (1980); *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1803, 1805 (1980); see also U.S. Const., Art. I, § 8, Cls. 12-14; *Roetker* v. *Goldberg*, 453 U.S. 57, 59-61, 65, 68, 75 (1981); *O'Brien*, 391 U.S. at 377, 381; *Selective Service System* v. *Minnesota Public Interest Research Group*, slip op. 2-3 (Powell, J., concurring).

more comprehensive system could be designed and implemented. Nothing in these considerations is related to the suppression of constitutional rights.

Likewise, the enforcement policy was substantially related to these governmental interests, and any incidental effect on First Amendment rights was no greater than essential to the furtherance of such interests. This element of the *O'Brien* test requires that the governmental regulation not be "substantially broader than necessary to protect the [government's] interest." *Taxpayers for Vincent*, slip op. 17; see also *CCNV*, slip op. 6. Under this standard, the governmental regulation must relate to its legitimate objectives "and do[] nothing more. In other words, both the governmental interest and the [governmental regulation] are [to be] limited to the noncommunicative aspect of * * * [the defendant's] conduct." *O'Brien*, 391 U.S. at 381-382; see also Ely, *supra*, 88 Harv. L. Rev. at 1484-1486. Accordingly, the required nexus exists if the government regulation, judged in relation to the ends it is designed to serve, is not overly broad. And this requirement is not violated if there is "no more than a disagreement with the * * * [Executive over policy goals and the means to achieve them]. *O'Brien* [does not] assign to the judiciary the authority to replace the [Executive in its responsibilities] or endow the judiciary with the competence to judge * * * [what policies are] wise and how * * * [those policies are] to be attained." *CCNV*, slip op. 11; see also *Taxpayers for Vincent*, slip op. 25-27.

Because it did not extend beyond legitimate prosecutorial purposes, the "passive enforcement" system satisfied this standard. By focusing on those who were reported as possible nonregistrants, the government could target its investigatory resources on people who it had reason to believe were out of compliance with the law. In addition, this enforcement system helped to enable the government to pursue the strongest cases and most flagrant violators. It also reinforced the deterrent effect of the prosecutions that were brought. And, once again, the "passive" system was the only practical means avail-

able at the time for enforcing the registration law on a nationwide basis. Accordingly, the "passive enforcement" system was not overbroad in relation to the achievement of its objectives or directed to the constitutionally protected aspect of the defendants' activities.

Petitioner contends, however, that the "passive enforcement" system was a "content-based regulatory policy" (Br. 17) that selected "only nonregistrants who exercised their First Amendment right to criticize the draft and draft registration by writing to government officials or by speaking out publicly" (*id.* at 22). In his view (*id.* at 23; emphasis added):

> The Selective Service passive enforcement policy was * * * not activated by violation of the draft registration law or even by First Amendment activity in general, but rather *was aroused only by First Amendment activity conveying a particular political message.* Even though the enforcement policy did not overtly punish protected speech as such, *it inevitably created a content-based regulatory system* with a concomitantly disparate, content-based impact on nonregistrants.

This contention is the linchpin of petitioner's First Amendment argument.

However, petitioner misconceives the nature of the "passive enforcement" system. A content-based standard is one that "regulat[es] speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, slip op. 14. Under the First Amendment, the government may not "discourage one viewpoint and advance another" (*Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 11) or "discriminate invidiously * * * in such a way as to 'aim[] at the suppression of dangerous ideas.'" *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 7 (citations omitted). See also *Board of Educ.* v. *Pico*, 457 U.S. 853, 870-871 (1982) (plurality opinion); *id.* at 877, 879-881 (Blackmun, J., concurring); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 536-537 (1980); *Police Department* v. *Mosley*, 408 U.S. 92, 95-96 (1972); *O'Brien*, 391 U.S. at 375, 382.

The "passive enforcement" system did not involve a content-based standard. Enforcement did not depend upon the substance of any protest against registration, the grounds of the objection, or the political viewpoint expressed. The government did not inquire whether the nonregistrant criticized the registration law and did not look to the reasons that were advanced for any such opposition that was stated; it did not matter whether his objection was based on philosophical, religious, political, legal, or personal views, whether the criticism came from the political right or the political left, or whether his position represented a conventional or idiosyncratic point of view. And no matter how vehement or outspoken the expression of opposition to draft registration, it created no exposure to enforcement efforts unless coupled with an indication to the government that the person had failed to register as required by law. Nonregistrants were thus prosecuted based solely on their "status" as confessors rather than "their views" (*Perry Educ. Ass'n*, slip op. 11). Because it did not draw distinctions on the basis of viewpoint, the "passive enforcement" system was content-neutral.

In addition, as we have previously discussed, the "passive enforcement" system did not single out "vocal" nonregistrants for investigation and possible prosecution. Of course, it was to be expected that any "vocal" nonregistrants who were identified would have been opposed to registration on some ground. But an otherwise neutral provision is not rendered invalid as content-based simply because it applies to people who are likely to have a particular outlook. See *Perry Educ. Ass'n*, slip op. 11-13 & n.9; *O'Brien*, 391 U.S. at 382; *cf. Minnesota Bd. for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 16-18; *Taxation With Representation*, slip op. 7-8.

B. The Traditional Selective-Prosecution Test Provides The Proper Legal Standard Here, And No Separate Inquiry Under The First Amendment Is Required

The foregoing discussion demonstrates that petitioner's argument that his prosecution violated the First Amendment is without merit under a proper First Amendment analysis. But it also demonstrates a more general proposition: in considering a claim that a defendant was impermissibly selected for prosecution because of the exercise of First Amendment rights, the appropriate standard is the traditional selective-prosecution test, and no independent inquiry under the First Amendment is required.

At bottom, petitioner's contention is that he was treated differently from others similarly situated and that this difference in treatment was based on impermissible considerations. Such a claim of discrimination is clearly in the nature of an equal-protection issue that best lends itself to analysis under the traditional test for selective prosecution, and this is no less true where the challenged distinction is asserted to implicate First Amendment values. *Cf. Carey* v. *Brown*, 447 U.S. 455 (1980); *Police Department* v. *Mosley*, *supra*. Indeed, the courts of appeals, in assessing claims virtually indistinguishable from petitioner's, have uniformly applied the selective-prosecution standard and have never suggested that an independent inquiry under the First Amendment is necessary or appropriate. See pages 23-24 & note 15, *supra*. This weight of experience is telling evidence against petitioner's argument.

Moreover, the selective prosecution and First Amendment analyses essentially overlap in this area. The defense of selective prosecution is established where the defendant can show that he was selected from among others similarly situated on the basis of improper considerations by the prosecutor, including the prosecutorial motivation to suppress or penalize protected First Amendment activities. In that event the prosecution is invalid, and it is

unnecessary to undertake a separate First Amendment analysis.

On the other hand, where no such showing of impermissible prosecutorial animus is made, the government's interest underlying the exercise of prosecutorial discretion would be "unrelated to the suppression of free expression" (*O'Brien*, 391 U.S. at 377). In that circumstance, *O'Brien* provides the correct standard for any First Amendment inquiry. For the reasons previously discussed, however, it seems clear that the remaining elements of the *O'Brien* test—that the challenged regulation further a substantial governmental interest and not extend beyond its legitimate objectives—would be satisfied by the good-faith exercise of the prosecutor's discretion in enforcing the law. Since prosecutorial discretion serves both important law-enforcement purposes in particular cases and significant systemic values in general, and since the sound exercise of that discretion will bear a sufficient relation to those interests, a defendant's First Amendment challenge to his prosecution would be unavailing under *O'Brien*.

Accordingly, the First Amendment does not require a distinct rule of decision for petitioner's claim of selective prosecution on the basis of his exercise of constitutional rights. Rather, as the courts of appeals have recognized, the proper standard is the traditional selective-prosecution test. Petitioner's contrary approach would be a radical and unwarranted departure from prevailing law and should be rejected by this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY

BRIEF

No. 83-1592

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

DAVID ALAN WAYTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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REPLY BRIEF FOR THE PETITIONER

The passive enforcement system singled out for investigation and prosecution 13 vocal nonregistrants from between 500,000 and one million quiet violators of the draft registration law. Ignoring this simple, uncontroverted truth, the government implies throughout its brief to this Court that David Alan Wayte's constitutional claim is essentially trivial. Yet to defend the indictments of Wayte and the handful of other vocal nonregistrants prosecuted pursuant to the passive enforcement system, the government must construct a legal argument that repudiates fundamental First Amendment doctrine developed and repeatedly sustained by this Court. Close scrutiny reveals four essential propositions avoided or inadequately addressed by the government: (1) no inquiry into governmental motive in adopting the passive enforcement system is necessary or appropriate to analyze petitioner's First Amendment claim; (2) the selection of young men for investigation and prosecution under the passive enforcement system was necessarily linked to the exercise of protected First Amendment rights and thus significantly burdened the exercise

of those rights; (3) the passive enforcement system did not serve any compelling governmental interest; in particular, because that system explicity focused on individuals who had directly petitioned the government, it could not serve as a general deterrent to other potential nonregistrants; and (4) application of well-established First Amendment principles in this case has no bearing on and in no way imperils the judicial deference normally accorded to the traditional exercise of case-by-case prosecutorial discretion.

1. The government's argument in this case is thick with design to engraft a novel intent requirement on the necessary First Amendment analysis. Its position is stark and direct. Well-established case law holds that "illicit . . . intent is not the sine qua non of a violation of the First Amendment." (*E.g., Minneapolis Star & Tribune v. Minnesota Comm'r. of Rev.*, __ U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295, 309 (1983).) Nonetheless, the government asserts that First Amendment doctrine should no longer apply when the issue is the constitutionality of a general administrative policy that authorizes criminal investigations and possible prosecution predicated solely on the exercise of First Amendment rights:

> [I]n considering a claim that defendant was impermissibly selected for prosecution because of the exercise of First Amendment rights, the appropriate standard is the traditional selective prosecution test, and no independent inquiry under the First Amendment is required.
>
> • • • •
>
> Such a claim of discrimination is clearly in the nature of an equal protection issue that best lends itself to analysis under the traditional test for equal protection, and this is no less true where the challenged distinction is asserted to implicate First Amendment values. (Brief for the United States at 48.)

This Court has never suggested, much less held that First Amendment review is unsuitable (or unnecessary) for evaluation and protection of First Amendment interests. The decisions of the Court that the government would have control of this case are all Fourteenth Amendment *equal protection* decisions, none involving the exercise of First Amendment rights. Each of those cases holds "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." (*City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976)). See Brief for the United States at 23, 40.[1] First Amendment decisions that specifically reject the necessity for any proof of intent, such as *Minneapolis Star & Tribune v. Minnesota Comm'r of Rev.*, *supra*, are not even acknowledged by the government. See Brief for Petitioner at 26-29.[2]

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[1]To the extent that the government suggests that the constitutional issue has turned on illicit motive where certain groups are selectively disadvantaged in the exercise of their First Amendment rights, (See Brief for the United States at 48, citing *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972)), that suggestion is simply untenable. Motive has in the past been immaterial in such cases. The Court struck down prohibitions on picketing in *Carey* and *Mosley* because the laws subjected specific parties to a disadvantage based on the subject matter or content of the parties' communications, *not* as the consequence of illegitimate legislative or administrative intent. See *Perry Ed. Assn. v. Perry Local Ed. Assn.*, __ U.S. __, 103 S.Ct. 948, 74 L.Ed.2d 794, 811 (1983) (explaining rationale of *Carey* and *Mosley*: "[i]n a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject"); *Carey*, 447 U.S. at 467 ("*While the State's motivation in protecting the First Amendment rights of employees involved in labor disputes is commendable*, that factor, without more, cannot justify the labor picketing exemption.") (emphasis added). See generally *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

[2]The government cites *Oyler v. Boles*, 368 U.S. 448 (1962), *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961),

2. In addition to the novel effort to inject an evil intent requirement into First Amendment doctrine, the government contends that, "where no showing of impermissible prosecutorial animus is made, *O'Brien* [*United States v. O'Brien*, 391 U.S. 367 (1968)] provides the correct standard for any First Amendment inquiry." (Brief for the United States at 49.) The *O'Brien* analysis, however, applies only to facially content-neutral policies with an "incidental" effect on First Amendment rights. 391 U.S. at 377. In contrast, because the passive enforcement system was necessarily and inherently linked to the exercise of First Amendment rights, it created a direct, content-sensitive burden on political speech that is valid only if "demonstrably supported not only by a legitimate state interest, but a compelling one," and if it "operate[d] without unnecessarily circumscribing protected expression." *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982).

At the time of the adoption of the passive enforcement system and throughout the period of its use, the government candidly and unqualifiedly acknowledged the essential structural connection between the class of vocal draft protestors and those nonregistrants identified by the system for investigation and prosecution.[3] For example, a June 30,

Snowden v. *Hughes*, 321 U.S. 1 (1944), and *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), as "selective prosecution" cases applicable here. See Brief for the United States at 22-23. But these decisions, like *Washington* v. *Davis* and its successor cases, simply did not concern general administrative policies that singled out for adverse treatment individuals who had exercised their First Amendment rights.

[3]Petitioner does not seek to "condemn [the government] because of the professionalism of its lawyers" for their recognition of this close logical linkage, as reflected in numerous internal governmental memoranda. (See Brief for the United States at 40.) But by virtue of that professionalism, the government cannot now deny that it has always fully appreciated the necessary bond that exists between the passive enforcement system and protected First Amendment activity.

1982, Justice Department memorandum from the Assistant Attorney General in charge of the Criminal Division to the Attorney General recognized that identifying nonregistrants solely by means of the passive program meant that

> the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register. (Jt.App. 336; see Brief for Petitioner at 4-8.)

Numerous other Justice Department memoranda repeated this judgment.[4] David J. Kline, the official responsible for overall enforcement of the draft registration law, reaffirmed the conclusion at trial. (Jt.App. 899-900.)

Plain common sense, of course, confirms this fundamental linkage. It simply blinks reality to imagine that anyone who wrote a public official to admit his failure to register was not by that very act expressing opposition to the draft.[5]

[4]See, e.g., Justice Department Memorandum, January 11, 1982, Jt.App. 276 ("Of the non-registrants referred to us, [religious] beliefs seem to be a reason given for the refusal to register in a significant number of cases. We suspect that this may not be true of the entire universe of non-registrants. Our sample is probably not typical since it was composed largely of persons who wrote to Selective Service expressing their reservations against registration."); Justice Department Memorandum, March 19, 1982, Jt.App. 300-01 ("A number of Mennonites, who historically have been reluctant to comply with Selective Service requirements, and others with religious or moral objections are represented in the 'self-reported' referrals. Those who were referred by others are liable to be vocal proponents of non-registration."); Justice Department Memorandum, June 14, 1982, Jt.App. 336.

[5]The government's hypothesis of the possible existence of an individual "who admitted his nonregistration but did not oppose the registration system" (Brief for the United States at 30) is purely fanciful. The passive enforcement system cannot be thus upheld by reliance upon a hypothetical abstraction inconsistent with the actual record here. Cf. *City Council of the City of Los Angeles* v. *Vincent*, ___ U.S. ___, 104 S.Ct. 2118, 80 L.Ed.2d 772, 781-84 (1984).

Like the students who wore armbands in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), the self-reporting nonregistrant's admission served no conceivable purpose other than to express a political or moral statement of dissent. Indeed, each of the young men actually investigated and prosecuted coupled his admission of nonregistration with a clear statement of objection to the registration requirement. (Jt.App. 88-222.) The two events — the admission and the protest — were necessarily intertwined.

In *Tinker*, the Court recognized that it was not concerned with a general dress code, which could be construed as content-neutral. See 393 U.S. at 507-08. The challenged administrative policy focused solely on armbands; in view of the students' clear purpose in wearing them, that policy was deemed by this Court to impinge directly on protected speech activity. *Id.*, at 508. The passive enforcement system, which was confined exclusively to individuals who wrote to public officials to admit their failure to register, in view of the nonregistrants' clear purpose to protest the registration requirement, necessarily imposed a similar content-based burden on protected First Amendment activity.[6]

Both the district court and the court of appeals recognized the inherently adverse practical impact of the passive enforcement system on First Amendment rights. Each court expressly found that at the time of the decision in this case,

[6]Because it was in fact triggered by a statement of protest, rather than actual violation of the registration law, in "several instances" the passive enforcement system identified for criminal investigation "persons who are not within the registration class [who had] written to the Service expressing their refusal to register. One such person was an eighty-year-old retired minister." (March 2, 1982 draft letter from Jensen to Puscheck, prepared by Kline, Jt.App. 286.)

"[a]ll [of the men who had been indicted] were vocal nonregistrants." (710 F.2d at 1387; Pet. App. A-9; 549 F.Supp. at 1379; Jt.App. 9.)

The rational linkage between vocal draft protestors and nonregistrants identified for investigation and prosecution by the passive enforcement system is not weakened by the provision for third-party reporting. The government provides absolutely no factual support — drawn either from the record before the Court in this case or from any other source — for its speculation that some nonregistrants may have been discovered and reported by a "friend or neighbor" as a result of nonprotected, nonspeech activity. Unlike housebreaking or car theft — the usual subjects of anonymous crime-stopping "tip" programs — failure to register produces no eyewitnesses. Young men will not be discovered in the act of nonregistering. Thus, it is neither surprising nor a mere statistical happenstance that those individuals actually identified were all vocal nonregistrants. Indeed, in a March 2, 1982, draft letter prepared for Assistant Attorney General D. Lowell Jensen, David Kline conceded that "[t]here is a high probability that persons who are reported by others are vocal proponents of nonregistration":

> Indeed, with the present universe of hundreds of thousands of non-registrants, the chances that a quiet nonregistrant will be prosecuted is probably about the same as the chances that he will be struck by lightning. (Jt.App. 290-91.)[7]

In view of this acknowledged linkage, the government's argument before this Court that the passive enforcement

[7]At the pretrial hearing Kline reaffirmed the statement within the letter, testifying, "I'm not embarrassed by it at all. In fact, I'm somewhat proud of my literacy." (Jt.App. 864.)

system was not triggered by a nonregistrant's exercise of First Amendment rights is at best disingenuous.

Equally disingenuous is the government's assertion that the system did not burden First Amendment rights because, regardless of his protected speech activity, a nonregistrant "could avoid prosecution merely by complying with his duty to register." (Brief for the United States at 17.)

At the time of pretrial proceedings in this case, between 500,000 and one million men had failed to register. Each of those men faces possible prosecution under an *active* enforcement system, such as the one using drivers' license records that is now in place. Each of those men could avoid prosecution by complying with the law.

The question now before the Court is not whether the government may validly enforce the registration law against a neutrally selected sample of those nonregistrants. Nor is the question whether young men who have registered may exercise their First Amendment rights to protest draft registration. The answer to both questions is obviously yes.

The question that must be addressed in this case — one that the government avoids entirely — is whether the First Amendment permits the government to adopt an enforcement policy that selects for investigation and possible prosecution from the massive class of nonregistrants *only* those individuals who have proclaimed their dissent from the registration requirement by writing government officials or engaging in other forms of vocal protest. Because that was the inevitable result of the passive enforcement system, that system necessarily had an adverse impact on First Amendment rights: Only nonregistrants with a particular political orientation who expressed that view were selected for investigation and possible prosecution.

The existence of the "beg policy" does not eliminate this disparate, content-based impact on nonregistrants. See *Tinker v. Des Moines Independent Community School Dist.*, *supra*, 393 U.S. at 504 (First Amendment rights of students violated by school policy that "any student wearing an armband would be asked to remove it, and if he refused he would be suspended"). It was only the vocal draft protestor, drawn into the passive enforcement system through his exercise of First Amendment rights, who was confronted with a demand by Selective Service or the Justice Department to comply with the beg policy or be prosecuted for nonregistration.

The government attempts to evade the inherently content-sensitive impact of the passive enforcement system by insisting that it did not single out for investigation and prosecution only vocal nonregistrants, while ignoring other potential offenders who were similarly situated. The government stresses that it "prosecuted all *known* nonregistrants." (Brief for the United States at 15.) Quite apart from the fact that both the district court and the court of appeals specifically rejected this contention — finding that "[m]any similarly situated men have not been prosecuted" (710 F.2d at 1386; Pet. App. A-9; 549 F.Supp. at 1379-81; Jt.App. 8-17) — the government's argument is tautological. The First Amendment defect in the passive enforcement system is exactly that, by design and in practice, it made "known" only those who signalled their nonregistration status by expressing dissent against draft registration. The government intentionally chose not to undertake any effort to identify quiet nonregistrants. What the government did not know it deliberately *elected* not to know.

3. It is undisputed that David Wayte, like eleven or perhaps all twelve of the other young men selected by the passive enforcement system for investigation and prosecution for nonregistration, was singled out solely as a con-

sequence of his writing the President to express opposition to the draft. (Jt.App. 88-90; see Brief for Petitioner at 17 & n. 19.) See also *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3921 (June 11, 1984); *United States v. Eklund*, 733 F.2d 1287, 1307 (8th Cir. 1984) (en banc) (dissenting opinion), *petition for cert. filed*, 52 U.S.L.W. 3908 (May 31, 1984). These letters represent a pure exercise of the First Amendment right to petition for redress of grievances. See Brief for Petitioner at 19.

Remarkably, the government ignores the fact that the constitutional right to petition is even in controversy here; the right is not so much as acknowledged in the government's brief. But it is precisely because the passive enforcement system was deliberately and primarily sensitive to individuals who *privately* petitioned the President to oppose the draft that the government errs in asserting that the system "would be especially effective to promote general deterrence and prevent the possibility that the failure to proceed against a *publicly known offender* would encourage others to violate the law." (Brief for the United States at 34) (emphasis added). If, as the government assumes by its argument, "the passive system focused on 'vocal' nonregistrants who wrote to the government to protest the registration law" (Brief for the United States at 33), as was its actual operation, and if, as the government repeatedly states, prosecuting officials were wholly unaware of any public protest by Wayte or the other indictees (*e.g.*, Brief for the United States at 12; Jt.App. 633, 637-38, 649, 650),[8] then it can never have been genuinely believed

[8] See Brief for the United States at 12:

> Kline . . . stated that he had no information regarding petitioner beyond what was contained in the Selective Service file [J.A. 528 M] and that petitioner was treated no differently than others. Frankle likewise explained that he had handled petitioner's case like that of everyone else and that, *apart from the letters petitioner had sent to the government, he had no knowledge of any activities in opposition to registration in which petitioner might have engaged.* (J.A. 633, 637-38, 649, 650.) Thus, petitioner "was not referred for possible prosecution because of any anti-draft or political activities. *He was referred simply because he offered his name to the attention of the Selective Service* . . . ." (Emphasis added.)

that prosecution of Wayte by the passive enforcement system would result in any more general deterrence than prosecution of any other nonregistrant. In fact, since publication in May, 1981 in the Federal Register[9] (see 46 Fed.Reg. 26727-28), in accord with the Privacy Act of 1974, 5 U.S.C. § 552a, made plain that solely the passive enforcement system would be applied to investigate and prosecute nonregistrants, indictment of Wayte would deter only petitioning for redress of grievances, not non-compliance with the law. For nonregistrants who sought to escape detection, silence was golden.

The government also presents as justification for its reliance upon the passive enforcement system the claim that "Selective Service was seeking to establish a more 'active' system for identifying nonregistrants." (Brief for the United States at 8.) Yet this effort only helps confirm petitioner's argument that operation of the passive system is unconstitutional: David Kline and Assistant Attorney General Jensen concluded, after all, that "the present passive identification program [was] liable to result in adverse judicial decisions based on defendant claims of selective prosecution." (Jt.App. 290, 883.) For the mere attempt to develop an alternative enforcement scheme,

[9] The government is thus factually incorrect that petitioner's argument regarding deterrence must fail because

> prior to judicial hearings on the issue of selective prosecution, nonregistrants did not know the government's prosecution policy. Rather, the government made every effort to maintain the secrecy of its policy. (Brief for the United States at 37) (emphasis added).

The policy was openly publicized before any plan for actual enforcement activity even commenced.

rather than its actual implementation, cannot somehow cure the unconstitutionality of the passive system."

"Moreover, the government misleads when it states that before July 1981 "Selective Service was seeking to establish a more 'active' system for identifying nonregistrants" (Brief for the United States at 8), as if to suggest that implementation of an alternative scheme to the passive program was always intended and imminent. In fact, the passive enforcement system was initially "the only system for which Selective Service had authority or resources" (Brief for the United States at 7), because no other authority or resources had been earnestly sought – as explained below.

Possible progress toward the development of an active program was arrested while Administration officials debated whether an alternative program should even be implemented. A July 6, 1981 Justice Department memorandum stated that "[t]here is a provision in a defense appropriations bill to give the Service access to social security records," but advised that "[a]pparently the Administration has not yet decided whether to support such an enforcement program." (Jt.App. 230.) See also Jt.App. 245 (July 14, 1981 Justice Department memorandum), 707-09 (July 31, 1981 letter from David Stockman concluding that "we do not believe that legislation permitting the Selective Service System to require the Social Security number is needed.") Though the President eventually signed FY82 Defense Authorization Act, PL. 97-86, on December 1, 1981, conferring on himself discretionary authority to require the provision of identifying Social Security data concerning young men eligible for registration, the March 2, 1982 draft letter from Jensen to Punchock stated that "the majority of our comments will address the issue of *whether the Service should create an active identification system*." (Jt.App. 234) (emphasis added). Kline testified that the letter was drafted because he "wanted to push the Service to the maximum extent that I could, toward an Active Enforcement System ...." (Jt.App. 798.) See also Jt.App. 803. At the April 12, 1982 meeting of the Military Manpower Task Force, a body established by President Reagan to advise on military personnel matters, one of the "major items" for discussion was "what we are going to do with the [draft] registration problems and compliance ... and what we are going to do about [young men] that have not yet registered." (Jt.App. 492.) The district court specifically found that Task Force concerns, including costs, delayed implementation of an active enforcement program

4. This case does not require the Court to examine a "prosecutor's charging decision." See Brief for the United States at 19-21. At issue here is a general, across-the-board *administrative policy* (46 Fed.Reg. 26727), not a determination about an individual case; and it was a policy formulated and adopted not by a United States Attorney or even the Justice Department, but by executive branch officials uninvolved in the "normal prosecutorial sequence." (549 F.Supp. at 1382-83; Pet.App. A26-27.) As the district court found, ordinarily it is the United States Attorney who ultimately decides which offender to prosecute. *Ibid.* Under the passive enforcement system, however, the names of all the young men to be investigated and prosecuted were transmitted to the prosecutors by Selective Service; the United States Attorney served as a mere functionary, performing only fixed and mechanical duties. See Jt.App. 915-19 (testimony of prosecutor). The prosecuting attorneys made no "decisions on ... sensitive issues," similar to those involved in prosecutorial immunity cases such as *Imbler v. Pachtman*, 424 U.S. 409, 431 at n.33 (1976), or the selective prosecution cases cited by the government. (Brief for the United States at 20-21.)

Applying traditional First Amendment analysis to determine the constitutionality of this administrative enforcement policy does not in any way threaten the broad discretion ordinarily entrusted to prosecutors. To the contrary, it has long been the rule that when a legislative or administrative policy such as the passive enforcement system limits communicative activity, "the delicate and difficult task falls upon the courts to weigh the circum-

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(349 F.Supp. at 1384; Jt.App. 29-30); a February 1982 Selective Service report, "Increasing Selective Service Registration Compliance," had described as "reasonable" the administrative and financial cost of an active program, but warned of a consequent "political" cost to the Administration from operation of a scheme that utilized Social Security records. (Jt.App. 565.)

ctscrve and to appraise the substantiality of the reasons advanced in support of the regulation." *Schneider v. State*, 308 U.S. 147, 161 (1939).[15]

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in petitioner's Opening Brief, the judgment of the court of appeals reversing the dismissal of the indictment against petitioner David Alan Wayte should be reversed.

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Respectfully submitted,

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[15]To the extent an issue of separation-of-powers is raised by adoption of the passive enforcement system, as the government suggests, it is the unilateral imposition by the executive branch of a non-statutory criterion governing investigation and prosecution that is in flat violation of separation-of-powers principles. Under our system, Congress defines the elements of a crime by statute. The executive branch lacks the power to add or subtract from the Congressional definition. Yet, by conditioning all prosecutions for failure to register on the existence of a letter of protest to the President or other public officials, the Executive Branch unlawfully added a new element to the Congressional definition of the offense. Where, as here, the "new element" involves speech which is protected by the First Amendment, the executive's attempt to modify Congress' definition violates both the substantive and procedural core of the Constitution. Cf. *I.N.S. v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).